STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff/Appellee,

v

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant/Appellant.

Michigan Supreme Court No: 123833
Court of Appeals No. 237471
Court of Claims No. 00-17592-CM

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123833

PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF

IN SUPPORT OF ITS RESPONSE IN OPPOSITION

TO THE DEFENDANT/APPELLANT'S

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION FOR ORAL ARGUMENT

On January 16, 2004, this Michigan Supreme Court entered an Order which provided that, pursuant to MCR 7.302(G)(1), the Clerk of the Court is to schedule oral argument on whether to grant the Defendant/Appellant's MDOT's ("Defendant") Application for Leave to Appeal. The Order said, in part, the following:

> "Pursuant to MCR 7.302(G)(1), we DIRECT the Clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1)." (**Exhibit 1** - Order of the Michigan Supreme Court dated January 16, 2004)

The Order further provides that the parties are to address whether, in response to Defendant's Motion for Summary Disposition, Plaintiff/Appellee Boddy Construction Company, Inc. ("Plaintiff") presented any admissible evidence to support its claim for additional compensation and whether Plaintiff presented sufficient evidence that Defendant waived compliance with the Notice of Claim section of the 1990 Standard Specification for Construction contract. In that regard, the Order stated:

> "The parties shall include among the issues to be addressed: (1) whether , in response to defendant's motion for summary disposition, plaintiff presented any admissible evidence to support its claim for additional compensation; see **Maiden** v **Rozwood**, 461 Mich 109 (1999); and (2) whether plaintiff presented sufficient evidence that defendant waived compliance with the Notice of Claim section of the 1990 Standard Specifications for Construction contract, specifically Sec. 1.05.12 to create a genuine issue of material fact on that question." (**Exhibit 1** - Order of the Michigan Supreme Court Dated January 16, 2004)

This Michigan Supreme Court has allowed each party to file supplemental briefs within 28 days of the date of the Order.

> "The parties may file supplemental briefs within 28 days of the date of this order." (**Exhibit 1** - Order of the Michigan Supreme Court Dated January 16, 2004)

This serves as the Plaintiff's Supplemental Brief. The Plaintiff requests that this Honorable Michigan Supreme Court enter an Order denying Defendant's Application for Leave to Appeal.

STATEMENT OF THE ISSUES PRESENTED BY THIS MICHIGAN SUPREME COURT

I. DID THE PLAINTIFF SUPPLY ADMISSIBLE EVIDENCE DEMONSTRATING ITS CLAIM FOR ADDITIONAL COMPENSATION TO THE TRIAL COURT AT THE DEFENDANT'S MOTION FOR SUMMARY DISPOSITION?

Plaintiff/Appellee says:	"Yes."
Defendant/Appellant says:	"No."
Court of Appeals says:	"Remand."
Trial Court says:	"No."

II. DID THE PLAINTIFF PRESENT SUFFICIENT EVIDENCE THAT THE DEFENDANT WAIVED STRICT COMPLIANCE WITH SECTION 1.05.12 OF THE 1990 STANDARD OF SPECIFICATIONS FOR CONSTRUCTION?

Plaintiff/Appellee says:	"Yes."
Defendant/Appellant says:	"No."
Court of Appeals says:	"Yes."
Trial Court says:	"No."

I. COUNTER-STATEMENT OF STANDARD OF REVIEW

This Michigan Supreme Court reviews a Court of Appeals Order pursuant to MCR 7.302(B) when deciding whether there are sufficient grounds to grant an Application for Leave to Appeal. Here, the Defendant fails to demonstrate that there are grounds for granting this Application for Leave to Appeal pursuant to MCR 7.302(B). If this Michigan Supreme Court grants this Application for Leave to Appeal, it reviews the Court of Appeals Opinion reversing the Trial Court's Order granting the Defendant's Motion for Summary Disposition de novo.

II. STATEMENT OF THE RELEVANT FACTS

On June 21, 1995, Plaintiff and the Defendant entered into a contract on a construction Project M7703103559A ("Project"), which consisted of 2.2 miles of reconstruction along M-29 in St. Clair County. Plaintiff performed extra work outside of the scope of the original contract. This extra work resulted in additional costs and expenses to Plaintiff in the amount of $737,954.66.

The Plaintiff brought suit seeking compensation for the extra work that it performed. The Defendant filed a Motion for Summary Disposition which was granted by the Trial Court. The Plaintiff appealed the Trial Court's ruling granting the Defendant's Motion for Summary Disposition. The Court of Appeals then issued **Boddy** v **MDOT**, unpublished opinion per curiam of the Court of Appeals, decided [February 28, 2003] (Docket No. 237471), which reversed the Trial Court's Order granting the Defendant's Motion for Summary Disposition and remanding for further proceedings to determine whether the Plaintiff was, in fact, entitled to additional compensation. The Court of Appeals said, in part, the following:

> "Nevertheless, we agree with plaintiff's contention that defendant waived strict compliance with Sec. 1.05.12. See **Jacob** v **Cumings**, 213 Mich 373; 182 NW 115 (1921). Here, the record indicates that defendant waived strict compliance with the written notice requirement by agreeing with plaintiff to resolve disputes arising with the plans and specifications of the project without the need of filing a written notice of intent to file a claim. Thus, the trial court erred, as a matter of law, in ruling that defendant did not waive strict compliance with Sec. 1.05.12(a) of the 1990 Standard Specifications for construction." (**Boddy**, at p. 2.) **(Exhibit 2)**
>
> **"On remand, the trial court is thus instructed to determine whether plaintiff was entitled to additional compensation and in what amount."** (**Boddy** v **MDOT**, unpublished opinion per curiam of the Court of Appeals decided [February 28, 2003] (Docket No. 23741).) (Emphasis Added) **(Exhibit 2)**

The Defendant then filed a Motion for Rehearing which was denied by the Court of Appeals.

"**The Court orders that the motion for rehearing is DENIED.**" (**Exhibit 3** - Order of the Court of Appeals Dated April 18, 2003.) (Emphasis Added)

On May 9, 2003, the Defendants filed an Application for Leave to Appeal to this Michigan Supreme Court. On January 16, 2004, this Michigan Supreme Court, pursuant to MCR 7.302(G)(1), issued an Order directing the Clerk of this Michigan Supreme Court to schedule oral argument on whether to grant the Defendant's Application for Leave to Appeal. (**Exhibit 1**) The Order allowed the parties 28 days to submit supplemental briefs. (**Exhibit 1**)

III. LEGAL ARGUMENTS

A. The Plaintiff did Supply Admissible Evidence Demonstrating its Claim for Additional Compensation to the Trial Court at the Defendant's Motion for Summary Disposition.

In its response to the Defendant's Motion for Summary Disposition ("response"), the Plaintiff identified and broke down each of its claims for additional compensation. The Plaintiff provided a detailed examination of each claim. In fact, the Plaintiff attached, as Exhibit H to its response, a letter dated November 22, 1999 from the Defendant which denied each of the particular claims for additional compensation. (**Exhibit 4**) This letter memorialized the Defendant's decisions after a Central Office Review of the Plaintiff's claims for additional compensation which occurred on September 14, 1999.[1] The November 22, 1999 letter specifically acknowledged the claims for additional compensation, the nature of the claims, and the amount associated with each claim.

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[1] The Plaintiff also attached as Exhibit D to its Response a letter from the Defendant dated May 19, 1997 which provided the Defendant's decisions after a District Construction Engineer level meeting related to the Plaintiff's claim for additional compensation. (**Exhibit 5**) This letter provides that some claims were approved despite a failure by the Plaintiff to provide written notice. The Plaintiff also attached as Exhibit E to its Response a letter from the Defendant dated April 1, 1999 which memorialized the Defendant's decisions after a region meeting to review the Plaintiff's claims for additional compensation. This letter represented a direction of payment on some of the claim and a denial of others. (**Exhibit 6**)

"1. Pavement gapping $204,287.53

2. Installation of geotextile separator - $338,682.00

3. Contractor staking and as-built drawings - $66,565.67

4. Traffic control services $35,309.00

5. Excavation of fine grade for additional bituminous $87,360.23

6. Excavation of fine grade for sidewalk and curb $5,750.33." (**Exhibit 4** – Defendant's Letter to Plaintiff Dated November 22, 1999)

Pursuant to the Michigan Rules of Evidence, this November 22, 1999 letter constitutes admissible evidence. MRE 402 provides that all relevant evidence is admissible.

> "**All relevant evidence is admissible**, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." (MRE 402) (Emphasis Added)

MRE 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable.

> "'**Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable** or less probable than it would be without the evidence." (MRE 401) (Emphasis Added)

Here, this November 22, 1999 letter is relevant because it makes the Plaintiff's claim for additional compensation more probable because it specifically acknowledges the claims for additional compensation, the nature of the claims, and the amount associated with each claim. Furthermore, because the November 22, 1999 letter was signed by one of the Defendant's representatives it is an admission by a party opponent and, as a result, is not hearsay under MRE 801(d)(2):

> "**(d) Statements Which Are Not Hearsay.** A statement is not hearsay if-
> . . .
> (2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity. . ." (MRE 801(d)(2))

Finally, the letter presented to the Trial Court was a duplicate and, pursuant to MRE 1003, duplicates are admissible.[2]

> "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." (MRE 1003)

Consequently, this letter was admissible evidence.

With regard to the **first** claim for additional compensation -- pavement gapping -- the Plaintiff's response explained to the Trial Court that the Construction Final from the Defendant shows that the **bid quantity** for "pavement gapping" was only **750 linear feet**. However, the **completed quantity as directed by the Defendant was 2,259 linear feet**. This is over three times as much as originally planned when the project was bid. Furthermore, the Plaintiff explained to the Trial Court that the Defendant's records showed the quantity bid for "**aggregate use under concrete**" was **2,500** tons while the constructed quantity was **9,859.46** tons. Finally, the Plaintiff explained that the Defendant's Inspector Daily Reports ("IDR") and Recommendation/Authorizations (which were produced as part of the Plaintiff's response to the Defendant's Request for Production of Documents and later in Response to the Notice of Deposition Duces Tecum) substantiate the increases in pavement gapping and aggregate for temporary drives and access road related to the project.[3] Thus, the evidence presented with

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[2] The Defendant never challenged the authenticity of this November 22, 1999 letter.

[3] The IDR's are relevant because they make the Plaintiff's claim for additional compensation more probable.Furthermore, the IDR's are records of regularly conducted activity – MRE 803(6).

respect to this first claim is clear, admissible and well identified in the record.

The **second** claim is for additional compensation related to the geotextile separator. This is a mesh-like material used to separate different road materials. With regard to this claim, the Plaintiff attached to its response a copy of a correspondence dated May 19, 1997 from the Defendant to the Plaintiff. This correspondence came from the Defendant and memorialized a District Construction Engineer level meeting with the Plaintiff and the Defendant. Specifically, this May 19, 1997 correspondence provides an examination of the Plaintiff's claim for additional compensation related to the geotextile separator. In particular, this correspondence demonstrates the Plaintiff's position that it had to purchase 177,417 square feet of geotextile separator for the project, but only 105,052 square feet was actually paid for. Thus, the claim was very specific:

> "Contractor:
> The geotextile separator is not shown on the plan except between the under drains. The contractor was directed to place the geotextile separator around the end of the aggregate base for concrete and then fold it back over the aggregate base and up the back of the curb with an overlapping piece. Also, there is a big shortage of material. The amount purchased was 177,417 sft. and 105,052 sft. was paid for. The job was bid from a small set of plans." (**Exhibit 5** – Defendant's Correspondence to the Plaintiff Dated May 19, 1997)

This May 19, 1997 correspondence is relevant because it made the Plaintiff's claim for additional compensation more probable by demonstrating that the Plaintiff was only paid for 105,052 sft of material when it actually used 177,417. Furthermore, because this May 19, 1997 correspondence was signed by a representative of the Defendants, it constitutes an admission by a party opponent under MRE 801(d)(2). This May 19, 1997 correspondence was admissible evidence.

Beyond presenting this May 19, 1997 correspondence, the Plaintiff's Counsel, at the Defendant's Motion for Summary Disposition hearing on May 9, 2001, spent an extended time explaining to the Trial Court this claim for additional compensation associated with the

geotextile separator.

> "It's not, for example, as Mr. Brickey would suggest, that Mr. Boddy had all of this in his head, and I'd like to take for a moment, if the Court would, an example of probably the singular best claim, that being the claim with regard to this geotextile separator and talk about that and how that comes about.
>
> THE COURT: Do you agree that it was first brought in 1997?
>
> MR. SCOTT: The claim?
>
> THE COURT: Mm-hmm
>
> Mr. Scott: No, not at all. In fact, there's letters attached to ours showing as early as 1995 when Mr. Brickey referenced them. ...This geotextile separator, as your Honor said, first, it refers to a drawing, and there is a huge dispute with regard to the drawings because if you look on the drawing, there is a line, and this is not clear where the line ends. So the first dispute was, where do you have to install this separator fabric to and until where?" (**Exhibit 7** - Trial Ct. Tr. Dated May 9, 2001 at pp. 30-31.)

Plaintiff's counsel indicated that although the Defendant wanted the geotextile separator installed around the curb, into the aggregate and underneath the curb, **this did not work**.

> "MDOT's position is you were supposed to install it around the curb into the aggregate and underneath the curb. All of the testimony agrees. There is no dispute. It's uncontroverted that that procedure didn't work. It's uncontroverted that no one from MDOT forgot that Boddy – it was Boddy's first job. No one from MDOT had ever seen this fabric used in that fashion before or since on any jobs, but in this job their position now is that that fabric was supposed to be installed around the edge of the curb and tucked under before the curb was installed." (**Exhibit 7** - Trial Ct. Tr. Dated May 9, 2001 at p. 31.)

The reason the installation of the geotextile separator did not work is because the curb machine kept snagging the geotextile separator.

> "It's also uncontroverted what happened is when they brought the machine in to install the curb, it would snag the fabric and tear it apart. So they stopped that immediately. And instead they had them take the fabric and just stretch it out behind the curb, and they had the curb machine come in and install the curbs." (**Exhibit 7** - Trial Ct. Tr. Dated May 9, 2001 at p. 31.)

Plaintiff's counsel explained that the Defendant, because of the problems with the geotextile separator, instructed the Plaintiff to simply cut the fabric into 18" strips and install it by hand for 2.2 miles in each direction.

> "And then what they did is, the inspectors instructed Boddy to cut this fabric into 18-inch strips and install it by hand up against the back of the curb 2.2 miles in each direction." (**Exhibit 7** - Trial Ct. Tr. Dated May 9, 2001 at p. 31.)

According to Plaintiff, it took a five or six-man crew to layout this geotextile separator by hand.

> "Now, Boddy gave them all of the documentation with regard to it. It took a five or six-man crew. They had to do this many feet a day. This is how long it took us. This is the extra cost. What is not disputed here? What's not disputed is that's the instructions we got from MDOT: Cut it in 18-inch strips and put it in that way.
>
> What's not disputed is there is no specification that could possibly even be interpreted to instruct Boddy to do it that way. That Boddy did not contract to install it that way." (**Exhibit 7** - Trial Ct. Tr. Dated May 9, 2001 at p. 32)

As a result, there is no doubt that the Plaintiff, through its written response to the Defendant's Motion for Summary Disposition, and through its oral argument at the summary disposition hearing, provided extensive and admissible evidence to the Trial Court related to its claim for additional compensation on the geotextile issue.

The **third** claim is for contractor staking and as-built drawings. In their response, the Plaintiff states that, as a result of the Defendant's inadequate and incomplete plans for this project, quantities increased for various items and work items were added. The Plaintiff indicated to the Trial Court that a detailed list of these items was provided to the Defendant on several occasions. In fact, the Plaintiff informed the Trial Court that the additional items of work regarding the item "contract staking" and "as-built drawings" are substantiated in the Defendant's IDR's and Recommendations/Authorizations provided by Boddy in response to MDOT's request

for production of documents.

The **fourth** claim is for traffic control services during a seasonal suspension which resulted from the Defendant's inadequate plans which delayed progress. These claims are substantiated in the Defendant's IDR's.

The **fifth** claim is for additional excavation and fine grade for additional bituminous approaches. In its response, the Plaintiff explained to the Trial Court that the Defendant's own records show that the bituminous approach quantity was increased from 105 tons to 1,637 tons (16 times) in small increments as the Defendant decided to install approaches in various areas. The Plaintiff explained that the bituminous approaches were 330 lbs. per square yard with 8" of aggregate loose. The plan quantity of 105 tons would have constructed 636 square yards, while the quantity of 1,637 tons as increased by the Defendant required construction of 9,920 square yards of bituminous approaches. These extra costs are reflected in the Defendant's IDR's.

The **sixth** claim is for additional excavation and fine grade for additional sidewalk and curb and gutter installation. In its response the Plaintiff explained to the Trial Court that the Defendant's records show an increase in sidewalk quantity from 2,504 sft. to 14,463 sft. and an increase in the curb and gutter quantity. These increases were in small increments as verbally directed by the Defendant and were reflected in the IDR's.

The question posed by this Michigan Supreme Court asked whether the Plaintiff supplied evidence to the Trial Court at the Defendant's Motion for Summary Disposition demonstrating its Claim for Additional Compensation. Immediately after posing this issue for briefing, this Michigan Supreme Court cited its opinion in **Maiden** v **Rozwood**, 461 Mich. 109 (1999). In **Maiden**, this Michigan Supreme Court ruled:

> "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions,

> admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." (**Maiden**, 461 Mich. at p. 120.)

Here, the evidence proffered by the Plaintiff, through its written and oral response to the Defendant's Motion for Summary Disposition, provides admissible factual and specific evidence demonstrating its claims for additional compensation.[4] When all of this evidence is evaluated in a light most favorable to the Plaintiff, as required by this Michigan Supreme Court's ruling in **Maiden**, it is clear that the Trial Court erred in granting the Defendant's Motion for Summary Disposition and the Court of Appeals properly reversed the Trial Court. There is no basis to grant the Defendant's Application for Leave to Appeal.

B. The Plaintiff Presented Sufficient Evidence That the Defendant Waived Strict Compliance With Section 1.05.12 of the 1990 Standard of Specifications for Construction.

In its Opinion, the Court of Appeals ruled that the Defendant waived strict compliance with Sec. 1.05.12 of the 1990 Standard Specifications for Construction. Those provisions provide that the Plaintiff, as the contractor, shall notify the Defendant's Engineer in writing of the

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[4] The Michigan Court of Appeals also recognized that the Plaintiff provided testimony indicating that there may be handwritten notes demonstrating support for additional compensation.

> "Horace Boddy, in his deposition testimony, indicated that there were handwritten notations documenting the cost for excavating and disposing of temporary aggregate off site in the amount of $91,407.37" (Boddy Dep at p. 3.)

Horace Boddy testified:

> "Q Is that figure $91,407.37 supported by any documentation?
> A I don't know if it is still around, Dave, or not.
> Q The documentation that – that you are not sure whether it is around or not, what would that be?
> A Just a yellow pad.
> Q Your handwritten notations?
> A Handwritten notations." (Boddy Dep at pp. 94.) (**Exhibit 8**)

Contractor's intention to make a claim for such extra compensation before beginning work on which the Contractor intends to base a claim.

> "Notice of Claim. - If the contractor intends to seek extra compensation for any reason not specifically covered elsewhere in the contract, the contractor shall notify the engineer in writing of the contractor's intention to make claim for such extra compensation before beginning work on which the contractor intends to base a claim or the contractor shall notify the engineer within twenty-four (24) hours after the commencement of the delay, suspension of work, loss of efficiency, loss of productivity or similar event on which the claim will be based . . . Failure of the contractor to give such information or to afford the engineer proper facilities for keeping strict account of actual costs of the work or delay upon which the notice of intent to file claim was made will constitute a waiver of the claim for such extra compensation or extension of contract time unless such claims are substantiated by department records and the extra costs were unforeseeable." **(Exhibit 9 -** Section 1.05.12(a) of the 1990 Specs.)

The Court of Appeals ruled as follows:

> "Nevertheless, we agree with plaintiff's contention that defendant waived strict compliance with Sec. 1.05.12. See **Jacob** v **Cumings**, 213 Mich 373; 182 NW 115 (1921). Here, the record indicates that defendant waived strict compliance with the written notice requirement by agreeing with plaintiff to resolve disputes arising with the plans and specifications of the project without the need of filing a written notice of intent to file a claim. Thus, the trial court erred, as a matter of law, in ruling that defendant did not waive strict compliance with Sec. 1.05.12(a) of the 1990 Standard Specifications for construction." (**Boddy** v **MDOT,** unpublished opinion per curiam of the Court of Appeals decided [February 28, 2003] (Docket # 237471), at p. 2.) **(Exhibit 2)**

The Court of Appeals made the right ruling because the Plaintiff did provide sufficient evidence of waiver. When the Court of Appeals made its ruling, it relied on this Michigan Supreme Court's controlling ruling in **Jacob** v **Cumings**, 213 Mich 373; 182 NW 115 (1921). In **Jacob**, this Michigan Supreme Court ruled that a party to a contract **may waive** the conditions or stipulations contained in a contract. If so, strict compliance with the terms of the contract is not necessary.

> "Plaintiff had a right to rest upon the agreement, or modify the same, or **waive** its terms. ...The written agreement, after it was signed by the defendant, could be modified, and strict performance thereunder waived or abrogated by the parties..." (**Jacob**, 182 NW at p. 117.) (Emphasis Added)

Since the Michigan Court of Appeals rendered its ruling in this case, this Michigan Supreme Court, in **Quality Products** v **Nagel,** 469 Mich 362; 666 NW2d 251, 253 (2003), provided additional instruction with regard to waiver of contractual terms. In **Quality Products**, this Michigan Supreme Court ruled that parties to a contract are **free to mutually waive or modify their contractual agreement**.

> **"We hold that parties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause because of the freedom to contract."** (**Quality Products and Concepts Company** v **Nagel**, 469 Mich 362; 666 NW2d 251, 253 (2003).) (Emphasis Added)

According to this Michigan Supreme Court, mutuality is the centerpiece to whether a contract has been properly modified. This "mutuality" can be represented through evidence of a written agreement, an oral agreement or **affirmative conduct establishing mutual agreement to modify**.[5]

> "Accordingly, mutuality is the centerpiece to waiving or modifying a contract, just as mutuality is the centerpiece to forming any contract. This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or **affirmative conduct establishing mutual agreement to modify or **254* waive the particular original contract."** (**Quality Products**, 666 NW2d at p. 253, 254) (Emphasis Added)

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[5] This Michigan Supreme Court ruled in **Quality Products**, that clear and convincing evidence is needed to show affirmative conduct which demonstrates a mutual agreement to modify the terms of a contract. (Clear and convincing evidence is defined as evidence which produces in the mind of the trier of fact a firm belief as to the truth of the allegation. – **Kefgen** v **Davidson**, 241 Mich. App 611; 617 NW2d 351, 360 (2000).)

According to this Michigan Supreme Court, if a course of conduct establishes that a contracting party knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied and the contract is thereby modified.

> **"Stated otherwise, when a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied." (Quality Products**, 666 NW2d at p. 258) (Emphasis Added)

Here, Horace Boddy (on behalf of the Plaintiff) testified that the Defendant told him that he did not have to file a Notice of Claim. (Horace Boddy's testimony was provided to the Trial Court as Exhibit B to the Plaintiff's Response to the Defendant's Motion for Summary Disposition.) The testimony includes the following:

> "Q Did anyone from MDOT tell you or anyone else from Boddy that Boddy did not have to file a Notice of Claim in this case?
>
> A Yes, Gene Coglin – Ralph Langdon did, Noel Smith told me, and even Jim Hansen after he come aboard for Noel Smith . . .
>
> Q When did Gene Coglin tell someone else from Boddy that a Notice of Claim was not required for any of the items involved in this lawsuit?
>
> A I think the first one, when they went down there and the told us to cut the driveways and put a – for a layer that is shown on the blueprint?
>
> Q In June of '95.
>
> A June or July of '95. . . .
>
> Q Did Gene Coglin ever tell – or make the statement at one of the meetings that a Notice of Claim is not required?
>
> A Either Gene Coglin did or Bob Tiera. . . .
>
> Q And Bob Tiera made that statement at a weekly meeting?
>
> A He made that statement at all of the weekly meetings until he was

transferred." (**Exhibit 8** - Boddy Dep. at pp. 68-70)

Moreover, the **Defendant's Resident Engineer, Ralph Langdon**, specifically testified on March 2, 2001 at his sworn deposition that the "contractual" claims procedure was **not** strictly adhered to. According to the sworn and submitted testimony of Langdon, the claims procedure was loosely adhered to because when a contractor encounters something in the field that was not anticipated – **that contractor is going to keep working and expect to get extra payment for the work**. (This testimony of Langdon was submitted to the Trial Court in Response to the Defendant's Motion for Summary Disposition.)

> "Q With the regard to the 8 or 10 claims that the contract either abandoned or you were able to work out and compromise, do you know if those claims procedures were strictly adhered to?
>
> A **Maybe not strictly adhered to. They were possibly adhered to loosely.** Most of the time **on extra work if the contractor encountered something on a project that we didn't anticipate** he's not going to stop work. **He's going to keep working and accept - expect to get extra payment for**. . . .
>
> Q That's generally speaking –
>
> A Right.
>
> Q -- the way it goes, right?
>
> A Right. Normally, you know, we don't know how much it's gonna cost. The contractor doesn't know how much it's gonna cost. So we – even though we agree that the contractor is gonna get reimbursed, we don't really know how much. So we try to keep records of what he does so at a later date we can pay him, even though it's not a claim. It's just extra work." (**Exhibit 10** - Langdon Dep at pp. 39-40.)

Additional evidence of the Defendant's waiver of strict compliance with the written notice provision is found in the Defendant's May 19, 1997 written response to a request for

additional compensation by the Plaintiff.[6] This May 19, 1997 letter to the Plaintiff arose out of a District Construction Engineer Level meeting conducted on May 6, 1997.7 In the May 19, 1997 letter, James C. Hanson, the Defendant's District Construction Engineer, approved some of the Plaintiff's requests for extra compensation, denied others and requested additional information with regard to the remaining requests. For example the Defendant approved a payment of $22,370.00 related to the Plaintiff's claim for removal of temporary drive material.

> "Decision:
> The addendum indicates that the material is temporary, but not how the removal will be paid. The Resident Engineer is directed to reimburse the contractor an additional 25 percent of the unit price of the Aggregate Base for Concrete (9,860 tons) used for drive maintenance. This is to be payment in full for moving the material as often as it was necessary to do so. **Payment amount $22,370.00.**" **(Exhibit 5** - Defendant's Correspondence to the Plaintiff Dated May 19, 1997) (Emphasis Added)

The Defendant also approved the Plaintiff's claim related to the increased cost of the topsoil under the sod.

> "Decision:
> **The Resident Engineer will negotiate an increased price for the topsoil over the quantity available on site and the required plan quantity.**" **(Exhibit 5** – Defendant's Correspondence to the Plaintiff Dated May 19, 1997) (Emphasis Added)

In reaching its decision regarding each of the requests at the May 6, 1997 meeting, the Defendant did not raise the issue of the Plaintiff failing to follow the written notice procedures of Section 1.05.12 (a) of the 1990 Specs. In fact, the Defendant actually approved payment for 2 of the 6 remaining requests in this action.[8]

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[6] This letter was attached as Exhibit D to the Plaintiff's response to the Defendant's Motion for Summary Disposition.

[7] As stated above this May 19, 1997 letter is admissible because it constitutes relevant evidence under MRE 401 and MRE 402 and is a party admission pursuant to MRE 801(d)(2).

[8]However, Boddy disputed the amount of the approved payment.

As this Michigan Supreme Court ruled in **Quality Products**, parties are free to mutually waive contractual requirements. This "mutuality" can be represented through evidence of a written agreement, an oral agreement or ***affirmative conduct*** **establishing mutual agreement to modify**. Here, an examination of the relationship between the Plaintiff and the Defendant reveals clear and convincing evidence of a course of affirmative conduct whereby the Defendant did waive the notice requirement contained within the Contract and on occasion did provide payment.

As stated above, the Defendant's Resident Engineer, Langdon, testified that the claims procedures were not strictly adhered to. Quite simply, Langdon testified that if the Plaintiff encountered extra work -- the course of conduct was not to stop work and wait for approval to keep going forward. Instead, the contractor would do the work and expect extra payment. In fact, the Defendant actually directed a payment of $22,370.00 to the Plaintiff for its claim related to the removal of temporary drive material. This fact alone evidences a confirmed course of conduct between the Plaintiff and the Defendant demonstrating a waiver of the notice requirement. The Plaintiff and the Defendant had a right, pursuant to this Michigan Supreme Courts ruling in **Quality Products**, to waive the notice requirement in the contract. The Plaintiff and the Defendant did waive that notice requirement and the Court of Appeals came to the right ruling in finding a waiver. As a result, the Defendant's Application for Leave to Appeal must be denied.

IV. CONCLUSIONS AND RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Honorable Michigan Supreme Court:

I. Enter an Order denying the Defendant's Application for Leave to Appeal; and

II. Enter an Order granting the Plaintiff costs and attorney fees for having to respond to the Defendant's Application for Leave to Appeal; and

III. Enter an Order awarding such other relief in favor of the Plaintiff as this Court deems just, equitable and appropriate.

Respectfully submitted,

O'REILLY RANCILIO P.C.

By: _____

Lawrence M. Scott (P30228)
Attorney for Plaintiff/Appellee
Sterling Town Center
12900 Hall Road, Suite 350
Sterling Heights, MI 48313
(586) 726-1000

Dated: February 12, 2004

PROOF OF SERVICE

I served **Plaintiff/Appellee's Supplemental Brief in Support of its Response in Opposition to the Defendant/Appellant's Application for Leave to Appeal** upon the attorneys of record and/or parties in this case on **February 12, 2004**. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

✗ **U.S. Mail**	❑ Fax
❑ Hand Delivered	❑ Messenger
❑ Express Mail Private	❑ Other:

/s/ Mary S. Browne

Mary S. Browne

J:\Boddy Construction Co\0006 MDOT\Appeal\Pleadings\Supplemental Brief Sup. Ct..doc

Order

Entered: January 16, 2004

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

123833

BODDY CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellee,

v

SC: 123833
COA: 237471
Ct of Claims: 00-017592-CM

MICHIGAN DEPARTMENT OF TRANSPORTATION,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the February 28, 2003 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(l), we DIRECT the Clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(l). The parties shall include among the issues to be addressed: (1) whether, in response to defendant's motion for summary disposition, plaintiff presented any admissible evidence to support its claim for additional compensation; see *Maiden v Rozwood*, 461 Mich 109 (1999); and (2) whether plaintiff presented sufficient evidence that defendant waived compliance with the Notice of Claim section of the 1990 Standard Specifications for Construction contract, specifically §1.05.12, to create a genuine issue of material fact on that question. The parties may file supplemental briefs within 28 days of the date of this order.

The application for leave to appeal remains pending.

s0113

SEAL OF THE MICHIGAN SUPREME COURT · LANSING ·

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 16, 2004

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED
February 28, 2003

No. 237471
Court of Claims
LC No. 00-017592-CM

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the opinion and order granting the motion for summary disposition brought by defendant Michigan Department of Transportation ("MDOT") under MCR 2.116(C)(8) and (10). We reverse and remand.

In this case, plaintiff is seeking $724,954.66 in additional compensation for highway reconstruction work performed along M-29 in St. Clair County. According to defendant, the construction contract expressly prohibited extra compensation in this case because plaintiff failed to provide timely notice to the MDOT engineer about its intention to seek additional compensation. Plaintiff counters that it was entitled to extra compensation because defendant waived this contractual provision. The trial court, without specifying the subrule under which it granted defendant's motion for summary disposition, found that plaintiff was not entitled to extra compensation because there was nothing in the record to indicate that defendant had given prior approval as required under the contract.

Because the trial court pierced the pleadings in granting summary disposition in defendant's favor, we review the grant of summary disposition under MCR 2.116(C)(10). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). As clarified by the Supreme Court in *Maiden*:

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence

produced at trial. A mere promise is insufficient under our court rules. [461 Mich at 121.]

In this case, the parties entered into a highway contract, which was governed by the 1990 Standard Specifications for Construction. Under § 1.05.12(a), the Notice of Claim provision, "the Contractor shall notify the [MDOT] Engineer in writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim. . . ." It is undisputed that plaintiff failed to provide the MDOT engineer in question with written notice of its intent to file a claim before beginning the work upon which plaintiff's claim is based.

Nevertheless, we agree with plaintiff's contention that defendant waived strict compliance with § 1.05.12. See *Jacob v Cumings*, 213 Mich 373; 182 NW 115 (1921). Here, the record indicates that defendant waived strict compliance with the written notice requirement by agreeing with plaintiff to resolve disputes arising with the plans and specifications of the project without the need of filing a written notice of intent to file a claim. Thus, the trial court erred, as a matter of law, in ruling that defendant did not waive strict compliance with § 1.05.12(a) of the 1990 Standard Specifications for Construction.

Further, there was a genuine issue of material fact whether plaintiff was entitled to additional compensation for its highway reconstruction work. Specifically, although defendant maintains that plaintiff has failed to attach any records substantiating its alleged claims, we note that Horace Boddy, in his deposition testimony, indicated that there were handwritten notations documenting the cost for excavating and disposing of temporary aggregate off site in the amount of $91,407.37. On remand, the trial court is thus instructed to determine whether plaintiff was entitled to additional compensation and in what amount.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio

Court of Appeals, State of Michigan

ORDER

Boddy Construction Co Inc v Michigan Dep't of Transportation

Docket No. 237471

LC No. 00-017592-CM

David H. Sawyer
Presiding Judge

Kathleen Jansen

Pat M. Donofrio
Judges

The Court orders that the motion for rehearing is DENIED.

Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

APR 18 2003
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

JOHN ENGLER, GOVERNOR

DEPARTMENT OF TRANSPORTATION
TRANSPORTATION BUILDING, 425 WEST OTTAWA POST OFFICE BOX 30050, LANSING, MICHIGAN 48909
PHONE: 517-373-2090 FAX: 517-373-0167 TDD/TTY - MICHIGAN RELAY CENTER: 800-649-3777
JAMES R. DeSANA, DIRECTOR

EXHIBIT

H

November 22, 1999

Mr. Horace Boddy, President
Boddy Construction Company, Inc.
2600 Wills
Marysville, Michigan 48040

Dear Mr. Boddy:

A Central Office Review for your claim on project M77031-34659A was held on September 14, 1999, in the Michigan Department of Transportation building in Lansing. The following were in attendance:

Mike Frankhouse	MDOT, Moderator
Randy Van Portfliet	MDOT, Chairperson
Andy Strupulis	MDOT, Panel Member
Michael Hemmingsen	MDOT, Panel Member
Larry Young	MDOT, Metro Region
Jim Shell	MDOT, Attorney General's Office
David Brickey	MDOT, Attorney General's Office
Ralph Langdon	Consoer, Townsend, and Envirodyne
Larry Washburn	MDOT, Metro Region
Ken Rushla	Boddy Construction, Inc.
Larry Scott	Boddy Construction, Inc., Attorney
Horace Boddy	Boddy Construction, Inc.
Ron Boddy	Boddy Construction, Inc.
Duke Dunn	Boddy Construction, Inc.

The project consists of 2.20 miles of reconstruction on I-94 BL from Range Road to M-29, City of Marysville, St. Clair County.

Your claim consists of 6 items:

1)	Pavement gapping	$204,287.53
2)	Installation of geotextile separator	$338,682.00
3)	Contractor staking and as built drawing	$ 66,565.57

4)	Increased costs for traffic control services	$ 35,309.00
5)	Excavation of fine grade for additional bituminous	$ 87,360.23
6)	Excavation of fine grade for sidewalk and curb	$ 5,750.33

Each item will be addressed separately.

ITEM 1: PAVEMENT GAPPING

PANEL DECISION

Careful consideration of the documentation provided by the Contractor and MDOT Metro Region was made by the Panel.

The Panel finds Subsection 6.31.13 of the 1990 Standard Specifications for Construction apply. Subsection 6.31.13 states, "The payment for Pavement Gapping is to reimburse the Contractor for the additional expenses involved in the interruption of paving operations, moving back to later pave the gap and the maintenance of the cross over."

Addendum 1 states:

The work item (aggregate base under concrete) shall be used to construct and maintain temporary drives to maintain access to residences and commercial establishments and where directed by the Engineer.

The Panel finds that payment for pavement gapping and aggregate base under concrete covers all the work necessary to construct, maintain and remove the temporary drives.

The claim for Item 1 is denied.

ITEM 2: INSTALLATION OF GEOTEXTILE SEPARATOR

The Panel finds that the limits of the geotextile separator are shown on the plans, and the Engineer's decision to allow the Contractor to install the separator in a manner different than that shown on the plans was only for the benefit of the Contractor.

The claim for Item 2 is denied.

ITEM 3: CONTRACTOR STAKING AND AS-BUILT MEASUREMENTS

The Panel examined the Special Provision for Contractor Staking found in the Project Proposal and determined that the Engineer acted properly in his interpretation and enforcement of this Special

Provision. The Contractor supplied no documentation showing the requirements set forth by the Special Provisions were not followed correctly by the Engineer.

The claim for Item 3 is denied.

ITEM 4: TRAFFIC CONTROL SERVICES

This project was let May 12, 1995, with a completion date of October 10, 1996. The Panel concludes that traffic control devices were required and should have been anticipated during winter shut down.

The claim for Item 4 is denied.

ITEM 5: EXCAVATION AND FINE GRADE FOR ADDITIONAL BITUMINOUS

The Panel finds no documentation that supports the Contractor's claim of having to re-grade and excavate for additional bituminous approaches.

The claim for Item 5 is denied.

ITEM 6: EXCAVATION AND FINE GRADE FOR SIDEWALK AND CURB

The Panel was presented with no documentation to support the Contractor's claim.

The claim for Item 6 is denied.

In addition, the Panel finds that the notice provision contained in the 1990 Standard Specifications for Construction was not complied with for any of the above referenced claims. Section 1.05.12 of the 1990 Standard Specifications for Construction states,

> "If the Contractor intends to seek extra compensation for any reason not specifically covered elsewhere in the contract, the Contractor shall notify the Engineer in writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim . . Failure of the Contractor to give such notification or to afford the Engineer proper facilities for keeping strict account of actual cost of the work . . . will constitute a waiver of the claim for such extra compensation."

The Panel finds that all issues were brought to the Engineer's attention after the fact. Therefore, pursuant to Section 1.05.12, the claims are waived.

Sincerely,

Randy Van Portfliet
Superior Region Engineer

Andy Strupulis
Resident Engineer

Michael Hemmingsen
Transportation Service Center Manager

I have reviewed the above decision and concur with it.

Gary D. Taylor
Chief Engineer/Deputy Director
Bureau of Highway Technical Services

Enclosure

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff,

v

Case No. 00-17592-CM

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION,

Hon. Peter D. Houk

Defendant.
_____/

O'REILLY, RANCILIO, NITZ, ANDREWS, TURNBULL & SCOTT, P.C.
LAWRENCE M. SCOTT (P30228)
GARY A. HANSZ (P44956)
Attorneys for Plaintiff
12900 Hall Road, Ste 350
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(810) 726-1000

DAVID D. BRICKEY (P48652)
Attorney for Defendant
Michigan Department of Attorney General
Transportation Division
P.O. Box 30050
Lansing, MI 48909
(517) 373-3445
_____/

PROOF OF SERVICE

I hereby certify that I served copies of:

1. Boddy Construction Company's Response to Defendant's Motion for Summary Disposition
2. Brief in Support of Response

upon the attorneys of record and/or parties on **May 2, 2001** by hand-delivering a copy to:

David D. Brickey
Michigan Department of Attorney General
Transportation Division
425 W. Ottawa Street
P.O. Box 30050
Lansing, MI 48909

Ray Shields

Subscribed and sworn to before me
this 2nd day of May, 2001

Barbara Trainer

BARBARA S. TRAINER
NOTARY PUBLIC MACOMB CO., MI
MY COMMISSION EXPIRES Jul 20, 2003

STATE OF MICHIGAN

JOHN ENGLER, GOVERNOR

DEPARTMENT OF TRANSPORTATION

18101 WEST 9 MILE ROAD, SOUTHFIELD, MICHIGAN 48075
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ROBERT A. WELKE, DIRECTOR

EXHIBIT D

RECEIVED MAY 21 1997

May 19, 1997

Mr. Horace Boddy, President
Boddy Construction Company, Inc.
200 - 14th Street
P.O. Box 308
Marysville, Michigan 48040

Dear Mr. Boddy:

A District Construction Engineer level meeting to review your claim on Project M 77032-34659A was held on May 6, 1997 at the Boddy Construction office in Marysville.

This project consists of 2.2 miles of reconstruction and widening with reinforced concrete pavement, drainage and intersection improvements on I-94 BL from Range Road northeasterly to its intersection with M-29 in the City of Marysville, St. Clair County.

The following were in attendance:

Horace Boddy	-	Boddy Construction
Ron Boddy	-	" "
David Bade	-	" "
Ralph Langdon	-	Michigan Department of Transportation
Robert Tiura	-	" " " "
Eugene Koglin	-	" " " "
Mary Lou Masko	-	" " " "
Charles Cook	-	" " " "
Jim Hanson	-	" " " "

The meeting was for your claim for increased costs consisting of twelve components as follows:

1. Payment for 6-inch Sewer Taps

2. Increase in Topsoil Required $ 12,960.00 Plus

3. Density Testing Problems	
4. Increased Contractor Staking	$ 9,444.60
5. Pavement Gapping Increase	19,998.61
6. Stage Construction Requirement Station 758+50 to Station 776+50	7,172.05
7. Removal of Temporary Drive Material	37,587.12
8. Excavation Increase NB M-29 Left Turn Lane	
9. Grading beyond six feet behind the curb and gutter	
10. Traffic Control Equipment and labor during Winter Shutdown - 1995-1996	21,304.16 Plus
11. Poured Concrete Box Culvert Removal	47,927.25
12. Geotextile Separator Increased Costs	338,682.00

Each of the twelve items will be presented and analyzed separately.

1. CLAIM FOR 6-INCH SEWER TAPS WHERE UNDERDRAINS ENTERED DRAINAGE STRUCTURES

Contractor:

During the first year of construction the drainage structures were built prior to underdrains being placed. It was necessary to tap into these structures. (The second year sleeves were placed in the structures to accommodate the underdrains). No inlet elevations were given on the plans.

Resident Engineer:

Payment for sewer taps only applies when tapping into existing structures. The underdrains were shown on the plans and tapped into the structures when the drain passed the structure. All drains placed were shown on the plans. The construction method used the second year is normal

(sleeves placed when structures were built). Taps were paid for when additional drains were added in the areas of subgrade undercuts.

Decision:

The drains were properly paid for. This claim is denied.

2. CLAIM FOR INCREASED COST OF TOPSOIL UNDER SOD

Contractor:

Slope restoration was placed under sod. This is contrary to the definition of slope restoration. The plan amount of topsoil was available on site. When quantities tripled, topsoil had to be purchased.

Resident Engineer:

The amount of sod required increased from 300 syds. To 10,000+ syds.

Decision:

The Resident Engineer will negotiate an increased price for the topsoil over the quantity available on site and the required plan quantity.

3. CLAIM FOR ADDITIONAL WORK REQUIRED DUE TO POOR MDOT DENSITY TESTS

Contractor:

At Michigan Avenue there was a problem obtaining density. Boddy Construction hired P.S.I. to check the density. P.S.I. found the density to be higher. The state employees (two students) kept pounding cones for each test. After Willis Stewart (MDOT Density Specialist),. Came to the site, there were no more problems.

Resident Engineer:

Many cones were pounded because the M.D.'s varied from 107 to 115. The material varied.

Moisture percentages varied by two percent. The P.S.I. tests and MDOT tests were close. P.S.I. took five tests. Two of those failed. (All MDOT tests failed). Willis Stewart thought that the consultant's methods were not correct. He talked to the operator and called the P.S.I. office and was not satisfied with the answers. Granular material was placed around drainage structures in lifts deeper than allowed by specifications.

Decision:

The material varied in moisture content (MDOT 4.2 percent to 9.2 percent, P.S.I. 5.4 percent to 11 percent). Two of six P.S.I. tests failed. Willis Stewart felt MDOT methods and equipment were correct. This claim is denied.

4. CLAIM FOR INCREASED CONTRACTOR STAKING

The contractor will submit more information showing what work was done. This will be submitted as a force account.

5. CLAIM FOR AN INCREASE IN THE AMOUNT OF PAVEMENT GAPPING REQUIRED

Contractor:

There was an increase of 1,300 lft. of pavement gapping. Stone was placed to accommodate cross traffic. The contractor was not paid to remove the stone.

Resident Engineer:

The contractor was paid for gapping where "bridges" were used to carry traffic. This amounted to approximately 700 lft. of the gapping quantity.

Result:

Mr. Horace Boddy will research this to determine exactly what this claim entails.

Note: The payment for "Pavement Gapping" includes "...the maintenance of cross traffic". See Page 417 of the Standard Specifications.

6. CLAIM FOR REMOVAL AND REPLACEMENT OF SAND SUBBASE, GEOTEXTILE FABRIC AND AGGREGATE BASE FROM STATION 758+50 TO STATION 776+50

Contractor:

MDOT inspectors required the contractor to construct the clay grade six feet beyond the new (Stage 1) edge of metal during Stage 1. This resulted in the area becoming contaminated and the contractor having to remove the contaminated material.

Resident Engineer:

The contractor was directed to construct the job in agreement with the plans (See typicals Pages 51 and 52). Pages 2, 3 and 4 of the plans have the following statement. "The contractor shall take precautions to avoid disturbance/contamination of the subbase and aggregate base-concrete, modified during stage construction. Any repairs will be at the contractor's expense." The contractor and MDOT agreed that the material became contaminated and needed to be removed.

Decision:

This is a very difficult area to construct. There may not have been a better method than the one utilized. MDOT required nothing more than the contract required. The plan note made contamination the contractor's responsibility. This claim is denied.

7. CLAIM FOR REMOVAL OF TEMPORARY DRIVE MATERIAL

Contractor:

Addendum #1 (which indicated that "aggregate base under concrete" would be used for temporary drives) does not indicate that removal of the material is included in the price of the material. The same material was used several times.

Resident Engineer:

The Addendum indicates that this is the temporary material. Payment should include removal.

Decision:

The Addendum indicates that the material is temporary, but not how the removal will be paid.

The Resident Engineer is directed to reimburse the contractor an additional 25 percent of the unit price of the Aggregate Base for Concrete (9,860 tons) used for drive maintenance. This is to be payment in full for moving the material as often as it was necessary to do so. Payment amount $22,370.00.

8. CLAIM FOR COMPLETING ADDITIONAL EXCAVATION ON THE LEFT TURN LANE FROM NORTHBOUND M-29

Contractor:

Plan Sheet 47 shows a 40-foot dimension from the right edge of metal on Northbound M-29 to the proposed left edge of metal of the turn lane. Scaling this proposed lane on the plans indicates a seven foot wide lane, which the contractor used to bid the excavation in this area which was paid as station grading. The contractor had no right to change this width.

Resident Engineer:

The cross section for the lane indicates a 12-foot width. The right edge of metal of Northbound M-29 varies. If a discrepancy exists, the contractor should have asked MDOT to interpret the plans. No excavation was completed prior to the correction.

Decision:

The 40-foot dimension is not given at any particular station. Since the right edge of metal varies, this dimension could not be used. The typical clearly shows a 12-foot lane width. This dimensioned width takes precedence over the accuracy of scaling off the plans. This claim is denied.

9. CLAIM FOR GRADING BEYOND SIX FEET BEHIND THE CURB AND GUTTER

Contractor:

A note on Page 2 of the plans states "Embankment C.I.P." included in Station Grading". Catch basins were added behind the curb with ditches added to drain the area. Typical cross-sections show work only to six feet behind the curb. In some areas grading was complete and then MDOT changed the plan. These areas were only paid for once.

Resident Engineer:

The typical on Page 2 of the plans shows grading beyond 6 feet back of curb and gutter. This is the mainline general typical. Slope stake lines on the plans indicate grading beyond the 6-foot point. There are some ditches shown on the plans. Page 47 of the Proposal indicates that Station Grading includes:

"1. Moving excavated material longitudinally and/or transversely where necessary or providing additional embankment material to obtain the required cross-section at all locations on this project." This is the work that was done.

Decision:

The mainline typical does show grading beyond the 6-foot behind curb limit. The limits of the station grading pay item on Page 49 of the Proposal is clear. Areas that were staked once and graded once should be paid as Station Grading one time. Any area staked and graded a second time should be paid for a second time.

10. CLAIM FOR SUPPLYING AND MAINTAINING TRAFFIC CONTROL DEVICES THROUGH THE WINTER OF 1995-1996

Contractor:

Job delays prevented Boddy Construction from paving in 1995. Worksafe has submitted a bill for supplying devices through the winter. Boddy Construction will be submitting a cost for picking up barrels every other day.

Resident Engineer:

Every stage of construction required traffic control. If the paving had been completed, driveways and the new edge of metal next to a drop off would have required Type II Barricades. Three, not six, target arrows were used through the winter. If the contractor receives approved Extensions of Time, the traffic items will be increased in accordance with the Standard Specifications.

Decision:

The contractor used no more equipment or manpower than could have been expected during the winter shut down. This claim is denied.

11. CLAIM FOR COMPENSATION FOR REMOVAL OF 3 POURED BOX CULVERTS

Contractor:

This work was not similar to the Masonry and Concrete Removal bid at $30.00/cyd. The price should be $175.00/cyd. more. This was not shown on the plans.

Resident Engineer:

An increase in cost is justified, but not $175.00/cyd. One box culvert with a gas main was paid by Force Account and this amounted to much less than $205.00/cyd.

Result:

Boddy Construction will attempt to justify the requested price of $175.00/cyd.

12. CLAIM FOR INCREASED COSTS FOR GEOTEXTILE SEPARATOR

Contractor:

The geotextile separator is not shown on the plan except between the underdrains. The contractor was directed to place the geotextile separator around the end of the aggregate base for concrete and then fold it back over the aggregate base and up the back of curb with an overlapping piece. Also, there is a big shortage of material. The amount purchased was 177,417 sft., and 105,052 sft. was paid for. The job was bid from a small set of plans.

Resident Engineer:

On a full size set of plans it is clear that the geotextile separator should wrap around the aggregate base for concrete and under the curb and gutter. Plan Sheet 5 of 8 shows the fabric passing the underdrain trench. Page 111 of the Proposal says the geotextile separator shall be measured "... to the limits of the OGDC as shown on the plans". Page 107 of the Proposal states the reason for geo-textile separator is to "...prevent intermixing of dissimilar aggregate or soil layers,..." indicating the necessity to wrap the aggregate base to accomplish this. The claim amount of $338,000.00 is exaggerated. This included work that would have to be done regardless of the placing of geotextile separator and increased work caused by the contractor.

Decision:

The small sized prints did not clearly show the extent of geotextile separator required. Several other areas of the plans and Proposal did indicate the placement clearly and the large set of plans clearly showed the required placement. The contractor was allowed to place the separator in a fashion easier than as per plan. This claim is denied.

Summary of Decisions:

Item 1	Denied
Item 2	Topsoil cost to be negotiated
Item 3	Denied
Item 4	Contractor to submit more information
Item 5	Contractor to clarify claim
Item 6	Denied
Item 7	Approved $22,370.00
Item 8	Denied
Item 9	Areas graded twice are to be paid twice
Item 10	Denied
Item 11	Contractor to submit more information
Item 12	Denied

The contractor is advised of the right to reject the Panel's decision and may file a written appeal with the District Engineer requesting a Central Office Review. Such appeal shall be filed within 15 days of the date of this written decision and shall present the contractor's argument as to why the Panel's decision is felt to be in error.

Sincerely,

James C Hanson

James C. Hanson,
District Construction Engineer

JCH:cd

c: P. Miller
R. Hubbell
Attendees

STATE OF MICHIGAN

JOHN ENGLER, GOVERNOR

DEPARTMENT OF TRANSPORTATION

18101 WEST 9 MILE ROAD, SOUTHFIELD, MICHIGAN 48075
PHONE: 248-483-5100 FAX NO: 248-569-3103 TDD/TTY - MICHIGAN RELAY CENTER 800-649-3777

JAMES R. DeSANA, DIRECTOR

EXHIBIT E

April 1, 1999

Mr. Horace Boddy
Boddy Construction Company, Inc.
200 14th Street
P.O. Box 308
Marysville, Michigan 48040

Dear Mr. Boddy:

A Region Meeting to review your claim on Project M77031-34659A, was held on February 10, 1999, at the Michigan Department of Transportation Fort Gratiot Project Field Office.

This project consisted of 2.2 miles of reconstruction and widening with reinforced concrete pavement, drainage and intersection improvements on I-94BL from Range Road northeasterly to its intersection with M-29 in the City of Marysville.

The following were in attendance:

Horace Boddy	Boddy Construction Co., Inc.
David Boddy	Boddy Construction Co., Inc.
Larry Scott	Boddy Construction Co., Inc.
David Bade	Boddy Construction Co., Inc.
Ralph Langdon	C.T.E. Engineering
Charlie Cook	M.D.O.T.
Gene Koglin	M.D.O.T.
Ernie Savas	M.D.O.T.
John D. Windemuth	M.D.O.T.
Larry P. Washburn	M.D.O.T.

RECEIVED APR 6 1999

The claim involves seven different issues:

A. Increase in the amount of pavement gapping and removal of temporary drive material - $204,287.53
B. Additional costs for removal of masonry and concrete structures - $77,256.30

C. Increased costs for installation of geotextile separator - $338,682.00
D. Increased costs for contractor staking and as-built drawings - $76,829.93
E. Increased costs for traffic control services - $35,309.00
F. Additional excavation and finegrade for additional bituminous approaches installed - $87,360.23
G. Additional Excavation and finegrade for additional sidewalk, and curb and gutter installation - $5750.33

The Panel reviewed all documents submitted, considered all information by oral presentation and reviewed the plans and proposal. The decision for each issue will be stated separately, but there is one factor common to all issues. That factor is that you did not follow the Notice of Claim Procedures as stated in Section 1.05.12a of the 1990 Standard Specifications. All issues were brought to the attention of the Resident Engineer after the fact. This resulted in the Resident Engineer never being able to either keep records of the "claimed" work activity or to have an opportunity to mitigate it prior to it becoming a "claim" issue.

ISSUE A - INCREASE IN THE AMOUNT OF PAVEMENT GAPPING AND REMOVAL OF TEMPORARY DRIVE MATERIAL - $204.287.53

You are requesting approximately $112,000 in costs for pavement gapped areas for multiple handling at the same location of the aggregate used in the gapped areas to maintain cross traffic through the gaps, as well as approximately $92,000 for removal of the same aggregate from the project site upon completion of the project.

The aggregate used in the gapped areas to maintain traffic was added as a pay item in Addendum #1 as the item "Aggregate Base Under Concrete," which also included the following note:

> **"The work item shall be used to construct and to maintain temporary drives to maintain access to residences and commercial establishments and where directed by the Engineer."**

An additional reference is made to the 1990 Standard Specifications for Construction, under 6.31 TRAFFIC MAINTENANCE AND CONTROL, in 6.31.13 Measurement and Payment, which in part states:

> **"The payment for Pavement Gapping is to reimburse the Contractor for the additional expenses involved in the interruption of paving operations, moving back to later pave the gap, and the maintenance of cross traffic."**

As far as the $112,000 for multiple handling at the same location of the aggregate in the gapped areas, it is the Panel's conclusion that those expenses are covered by the pay items Pavement Gapping and Aggregate Base Under Concrete (as referenced in Addendum #1). These pay items clearly cover the cost of the material, its placement and maintenance all such that traffic will have access through the gaps. As referenced above for Pavement Gapping it includes "additional expenses involved in the interruption of paving operations." It is the Contractor's responsibility to incorporate those expenses in his bid price as to how his work methods will be impacted by gapping including multiple handling of aggregate in gaps.

It is the Panel's decision that the approximate $112,000 portion of this issue for multiple handling of aggregate is denied.

The remaining portion of this issue is approximately $92,000 for the removal of the "gap" aggregate from the project site upon completion of the project. The Addendum #1 note referenced above states "temporary drives" which clearly infers removal at some point in the project. It was also noted this particular aggregate was stockpiled on the project until needed, paid per location it was used, and allowed to be replaced in the stockpile when removed and allowed to be reused again. Due to this allowed reusing of the aggregate would mean that the actual quantity required to be removed offsite from the project would be something less than the final quantity amount of 9860 tons. It was presented that this gap aggregate was the same material as required for the permanent aggregate base and as such, was allowed to remain in-place in the pavement section which would further reduce the quantity to be removed offsite.

It is the Panel's decision that the approximate $92,000 portion of this issue for disposing material offsite is denied.

ISSUE B - ADDITIONAL COSTS FOR REMOVAL OF MASONRY AND CONCRETE STRUCTURES - $77.256.30

The Panel concludes that the additional cyd of removal, approximately 244 cyd from box culvert removal and approximately 132 cyd from other assorted miscellaneous structure removals, is a significant enough change from the one cyd plan quantity that was set up and identified to warrant additional compensation.

The Panel concludes the force account calculations completed by the Engineer on a portion of this work has established a reasonable unit price of $96.57/cyd.

The Panel concludes the original plan quantity of one cyd will be paid at its established unit price of $30/cyd and the remaining approximate 376 cyd to be paid at $96.57/cyd.

ISSUE C - INCREASED COSTS FOR INSTALLATION OF GEOTEXTILE SEPARATOR - $338, 682.00

The Panel's review of the plan cross section detail, referred by you, as well as other similar plan cross section details, finds it very clear as to the limit and location of the geotextile separator, especially in the full size set of plans. You contend that you bid the job only from a half size set of plans which was solely your choice. This does not relieve you of the responsibility to use all means available to best understand what you are bidding.

The Panel also feels the Resident Engineer assisted you with changes to the placement of the geotextile separator which were to your benefit.

It is the Panel's decision that the claim issue is denied.

ISSUE D - INCREASED COSTS FOR CONTRACTOR STAKING AND AS-BUILT DRAWINGS - $76,829.93

The Panel's review of the Special Provision for Contractor staking finds it clear, as written, and concludes that the Resident Engineer's interpretation and enforcement of it, as written, is correct. This Special Provision is part of the contract documents and your bid is based on how it is written. Your contention that the Special Provision should now be amended because it has been revised on projects let after this one is unfounded, as well as your contention that the final contract amount should be selectively adjusted by including or excluding certain pay items that were deleted, increased or added as extras. Any contract adjustment to this pay item, as per the Special Provision, will be in accordance with the final contract amount based on using all pay items.

It is the Panel's decision that this claim issue is denied.

ISSUE E - INCREASED COSTS FOR TRAFFIC CONTROL SERVICES - $35,309.00

The Panel's review concludes that the project documents are clear that this was definitely a two-year project which would require traffic control devices to be in place during the winter '95/'96 seasonal shutdown and such devices would have to be provided and maintained per standard contract provisions.

It is the Panel's decision that the claim issue is denied.

ISSUE F - ADDITIONAL EXCAVATION AND FINE GRADE FOR ADDITIONAL BITUMINOUS APPROACHES INSTALLED - $87,360.23

No specific documentation or supporting information has been presented by you either to the Resident Engineer, as requested by him prior to this claim meeting, or to the Panel to support his contention of having to re-grade any areas of the project.

It was agreed that you would attempt to present supporting information to the Resident Engineer prior to the written decision of this claim in an attempt to resolve this issue.

As of the writing of this claim decision, no supporting information has been presented to the Resident Engineer and no further attempts have been made to resolve this issue.

It is the Panel's decision that this claim issue is denied.

ISSUE G - ADDITIONAL EXCAVATION AND FINE GRADE FOR ADDITIONAL SIDEWALK AND CURB AND GUTTER INSTALLATION - $5750.53

This issue is identical to issue "F" in that you presented no specific documentation or supporting information.

As with issue "F" it was agreed that you would attempt to present supporting information to the Resident Engineer prior to the written decision of this claim in an attempt to resolve this issue.

As of the writing of this claim decision, no supporting information has been presented to the Resident Engineer and no further attempts have been made to resolve this issue.

It is the Panel's decision that this claim issue is denied.

You are advised of the right to reject the Panel's decision and may file a written appeal with the Region Engineer requesting a Central Office Review.

Such an appeal must be filed within 15 days of the date of the written decision and must present your arguments as to why the Panel's decision is in error.

Sincerely,

Ernie Savas, P.E.
Metro Region Engineer

John D. Windemuth, P.E.
Metro Field Engineer

Larry P. Washburn, P.E.
Metro Construction Engineer

ES:JDW:LPW:bv

Attachment

c: James D. Culp
FHWA
Attendees

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff,

v File No. 00-17592-CM

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendants.
_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE PETER D. HOUK, CIRCUIT JUDGE

Ingham County, Michigan - Wednesday, May 9, 2001

APPEARANCES:

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Ingham County, Michigan

Wednesday, May 9, 2001 - 9:02 a.m.

THE COURT: Boddy Construction versus Department of Transportation.

MR. SCOTT: Ready, your Honor.

MR. BRICKEY: Thank you, your Honor. David Brickey on behalf of Michigan Department of Transportation. This is MDOT's motion for summary disposition. Our brief focused on the lack of written notice. In reading the Plaintiff's request for admissions or responses to our request for admissions and, frankly, reading the reply brief, it's not an issue any longer as far as whether they're contesting whether written notice was given. I think we've conceded that written notice wasn't provided on the claims at issue in this lawsuit.

Their focus now turns on whether MDOT waived the written notice requirement of the standard specifications, which are part of the contract between MDOT and the Plaintiff in this case.

They cite -- er, excuse me, refer to several things in their brief that they contend support their allegation that MDOT waived strict compliance or compliance at all with the waiver requirement -- er, excuse me, notice requirement.

THE COURT: Was this -- was this a standard MDOT contract? And the reason I ask that, the Plaintiff attached a letter from a -- what I would call a supervisor, one of Plaintiff's supervisors, to an MDOT official complaining about the quality of the inspectors that were on the job and referencing a comment that had been made by one of the inspectors that "this partnering is all bullshit."

And the drift that I got was between that and between the -- some other exchanges, that the contract was not a normal MDOT contract in the sense that I'm thinking, in the strict sense that this is -- this is absolutely it, you know, that --

MR. BRICKEY: There wasn't necessarily anything unusual about this contract. The contractor is still required to complete the work set forth in the contract in a manner that's acceptable to the owner, MDOT.

This partnering MDOT was attempting and still attempting to work with the contractors for better communication, frankly, to make sure everybody knows what's going on, on the project so there aren't any surprises. That is the partnering that is supposed to occur between the owner, MDOT, and the contractor in this case, Boddy. But there wasn't anything unusual,

per se, on this contract.

There wasn't anything different about this as opposed to other contracts. The standard specifications still applied. One of their claims is that something that is unusual about this job is that, in their opinion, their statement that this was the first job that MDOT used an outside consultant to draft the plans.

Frankly, that's not true. I don't think it makes any difference in the issues involved in this case, but I had an MDOT person just run one contractor's name that I know drafts plans all the time for jobs before 1995 and printed off -- I think there are six or eight jobs that they did before 1995 with that one contractor.

Again, I don't think that's an issue in this case. That's not -- that's not true that this is the first job that MDOT used an outside consultant.

They say this job was unusual because the SEG, who is the designer that drafted the plans, we haven't used them since the job because they were so poor. That's not true either. Again, I had the printout that SEG has been hired since this job, and this isn't the one and only job that SEG performed work for MDOT. Again, I don't think it really matters. I

think there are red herrings being thrown out there. I wanted the Court to know that that isn't necessarily accurate.

It may have been -- I don't want to say that because there was six to eight before 1995 that another contractor designed plans on. So way back when, MDOT had all in-house engineers draft their plans. That's not the case anymore. They're outside firms drafting the plans. So it was, perhaps, different in that respect than what some contractors may have been used to that hadn't worked on a plan or job that was designed by non-MDOT personnel.

In other words, the reason doesn't make any difference. In this case it's Boddy in this job. This is the first time they've served as a prime contractor for an MDOT job. So even if Boddy had been a former prime contractor for MDOT and was used to looking at plans designed by MDOT personnel and then said, "Well, these look different," that's not the case. This was the first job that Boddy served as a prime contractor for MDOT where it looked at the plans.

By the way, they only received the go ahead to serve as a prime contractor -- submitted a bid as a prime contractor four days before the bids were required to be turned in. They didn't have a whole lot

of time to review anything, or they really didn't take time.

So their contention that these are poor plans and "We didn't know what was going on," perhaps they shouldn't bid within a four-day period. Again, that's really not at issue in this waiver statement that the Plaintiff is making either.

What they've attached in support of this waiver statement of their's, I'd like to go through these because I don't think they support a waiver of anything. If anything, they show that that waiver didn't occur of this notice provision.

Working backward, Exhibit H is the Central Office Review, COR, decision. Their support in their brief as to why Exhibit H shows that MDOT waived the notice provision is that the COR, according to their brief, states "Give us more documentation. We'll take a look at it."

They're saying, "Well, if we waived it, they wouldn't have asked for additional documentation."

First of all, it's incorrect because the COR didn't ask for additional documents. Nowhere within this COR hearing, and I'd ask the Court to take a look at it, does the MDOT say -- the COR panel say, "Give us more documents."

It says, "We're denying your complaint because you haven't given any documents." It doesn't ask for any. Even if the COR said, "Give us some documentation, we'll take a look at it," it doesn't mean waive the notice requirement because under 1.05.12 of the specs, if the contractor fails to given written notice, which they failed in this case, then the claim will still be paid by MDOT if it's substantiated by MDOT documentation.

So if the COR said, "Give us some documentation, we'll take a look at it," they would have. If Boddy had given documents at the COR that substantiated its claim, MDOT documents, the COR would have paid it, even though they failed to give written notice. "We'll still take a look at it." That's what the spec requires.

Exhibit G, the deposition of Ernie Savas, again their brief says that Ernie Savas testified that he is a current MDOT employee, that Ernie Savas testified that he would consider the claim if they provided additional documentation today. Once again, he didn't say that. The deposition transcript that's attached, if you take a look, he never says that.

Again, even if he had, it still wouldn't support their argument that we waived the notice

requirement because if they had provided MDOT documentation that substantiated the claim, we would have paid it.

Exhibit F, the deposition transcript of Ralph Langdon, doesn't support the waiver either. He certainly didn't testify that he waived the written notice requirement. He kept -- or MDOT kept force account records on several items in this matter, your Honor. Horace Boddy indicates MDOT kept no force account records on any item at all on this project. That's not true. I have another affidavit from Ralph Langdon, if the Court would accept, and a pile of force account records that MDOT kept on this job.

Now, Mr. Boddy testified that MDOT only keeps force account records if there's the hint of a claim being filed. So even if there is a possibility of a claim being filed, MDOT keeps force account records.

If Boddy and MDOT had these conversations that they claim occurred, where they said, "Okay, we're going to file the claim --" Horace Boddy testified, "I told MDOT I am going to file a claim for a geotextile separator."

If that had happened, according to Horace Boddy's own testimony, that would have been, at

the very minimum, a hint of a claim, the possibility of a claim, and, therefore, MDOT would have kept force account records like they did on several other items. There aren't force account items for anything involved in this lawsuit. That's true. And because nobody from MDOT knew a claim was coming, they didn't put it in writing, and nobody told them that a claim was coming. They didn't keep force account records because they didn't know a claim was coming.

In order to accept their theory, it's kind of a conspiracy theory that MDOT will keep force account records for a multitude of claims. We'll keep all of the force account records for Items 1 through 15, but we're not going to keep any for these remaining six. I mean, it doesn't add up. It doesn't make any sense that MDOT would keep records on some items and not keep records on these six claims. That's what you'd have to believe under their waiver argument.

Exhibit E, the region review, they want you to believe that that supports MDOT's waiver because MDOT paid some additional compensation for some of the items even though Boddy hadn't provided the requisite written notice. Again, their failure to give written notice doesn't stop MDOT's inquiry. Their failure to give written notice limits the inquiry to MDOT

documentation. And if you look on page 3 of Exhibit E, which is the region meeting that they claim supports the waiver argument under issue B, the second paragraph under that section states:

> The panel concludes the force account calculations completed by the engineer on a portion of this work has established a unit price of $95.57 per cubic yard.

That is why they paid. The panel concluded that payment was due to the -- the contractor, Boddy Construction, because it looked at the force account records kept by MDOT and concluded that MDOT documentation on this issue substantiated the claim. That's why it paid.

Now, that doesn't support a waiver argument. That doesn't say, "Well, it's waived. I guess -- I guess we're out of luck." It says, "You didn't give us written notice. We're going to look at what supports it from MDOT documentation," and that is what they concluded.

Exhibit D, which is the district level review, again they have asked in the district review for additional documentation. They did -- they said, "You haven't given us any documentation. If you

provide it to us, we'll take a look."

Again, they would have done that.

THE COURT: When this project started, it was for how many linear feet?

MR. BRICKEY: It was 2.2 miles of reconstruction.

THE COURT: When it was finished, how many miles was it?

MR. BRICKEY: I don't think there's any difference than 2.2 miles.

THE COURT: 2.2 miles?

MR. BRICKEY: I can't state that for a fact.

MR. SCOTT: That's a fair statement, your Honor.

THE COURT: All right. Thank you.

MR. BRICKEY: They've been paid for every cubic yard of material. They've been paid for the material. They have been paid for every piece of material they put down, as far as bituminous and cement, the one item.

THE COURT: In the report the consumer line had to be moved either in or out of the right of way. I don't recall which. It wasn't clear in the submissions.

Was that done by change order of any kind?

MR. BRICKEY: There are -- attached to the second affidavit there are writer grams. It wasn't -- it complies with the standard specs. It gives written directives from MDOT to Boddy to do certain things. There's also authorizations and change order recommendations which I have had copied yesterday setting forth the 1., whatever it is, 1.6 or 1.7 million dollars of extras and additional compensation that MDOT has paid Boddy for the various items. That's in there. Their statement that there wasn't any written directive from MDOT is just wrong. It is just flat out wrong.

There are piles of force account records. There are piles of written change order recommendations and authorizations from MDOT. MDOT can't simply -- no engineer from MDOT, and rightfully so, can't agree to pay, can't agree to pay any contractor 1.6, 1.7 million dollars of extra compensation without having that approved in writing by Lansing. It's impossible. I mean, that doesn't happen. There is no way that can happen.

It's never going to survive an audit. It just -- it's -- it's impractical. It's not even plausible to think that this additional compensation paid to Boddy for items, like moving this gas line or

doing whatever else is documented in these authorizations, was done without any written directive. It just doesn't play out in the facts. The documentation doesn't support their argument.

Exhibit C, which is the first letter that the Court referenced earlier, and then the second two pages, here's the written notice on other items from Boddy saying "Here's our written notice under 1.05.12 of the standard spec." They obviously know they have to do it.

The second page -- the last page of Exhibit C, this is Horace Boddy's letter saying:

> In the future, extra work or work requiring materially altered methods or different materials due to changed conditions or character of the work will not be commenced until receipt of a written work order directing performance of the work and authorizing agreed upon compensation for same will be requested.

That's Horace Boddy saying "I am not doing anything in the future that is different or extra on this job unless somebody tells me in writing to do it."

Well, okay, fine. We waive written directives when there was extra work. You're not going to find any written directives for this work because obviously you didn't consider it extra. If you did, and if he's living up to his letter here, they wouldn't have done it.

Now he's going to say or he has said in the brief that "We went ahead and did it to expedite the job, to speed it up. We didn't wait for a written directive." Well, your Honor, how long is that going to take? How long is it going to take either for them, them being Boddy, to file a written notice of claim that doesn't slow up the job? What happens when they file a written notice of claim, is the engineer -- MDOT and Boddy meet try to work out a price. If they can't agree on a price, then force account records are kept, and they compare them at the end of each day to work out any differences they may have so everybody knows what's going on.

And, interesting, in their brief they say my motion is -- MDOT's motion is premature because all of the discovery hadn't occurred. Well, one, every one that they had scheduled to depose had been deposed at the time I filed it.

Secondly, they say the motion hinges on the

testimony of Horace Boddy and John Zimmer. John Zimmer is the project manager on this job. It's kind of interesting to note that if my motion hinges on his testimony, why they didn't attach any testimony from John Zimmer.

There is nothing in their brief from John Zimmer, and the reason is, is because John Zimmer doesn't support their claim. This is the one and only road construction job that John Zimmer has ever worked on, and he was in charge of this job for Boddy. John Zimmer testified he never heard anyone from MDOT say that written notice wasn't required.

John Zimmer told me in his deposition, when he was told where to place the geotextile separator, he may not have necessarily agreed with MDOT's interpretation of the plans, but he didn't say he disputed it. He didn't say, "We're going to file a claim." He didn't say, "Well, you're going to have to pay us extra money." He said he went ahead and did it.

Is that what is supposed to alert MDOT, "Oh, we better start keeping records on this?" Because John Zimmer doesn't say anything to him. There is no reason to think that a claim was coming until well after the fact. Their brief also says that MDOT never raised the lack of written notice and lack of

documentation argument until, I think it says, February of 1999.

I have a letter in there from Horace Boddy that I'll be happy to give the Court, from 1997, April 16 of 1997, and Ralph Langdon's response -- Ralph Langdon was the resident engineer from MDOT, -- April 28, 1997, stating "Your claim for geotextile separator is denied. You failed to give written notice under the specs. There is no MDOT documentation to support it." That's 1997, not 1999 like their brief says. That is just flat out wrong.

When they first raised these claims, MDOT's response was, "You didn't give us notice. We don't have any documentation." And we don't have any documentation.

If you look at their brief, there is no MDOT documentation attached to support their argument that their claim is substantiated by it.

They argue, "Well, MDOT hasn't objected to the documents that we say support it, which we provided under the notice of deposition and in discovery." That's not true. I do dispute it. I thought my brief was pretty clear. Just in case it's not, we contend that there is no MDOT documents whatsoever that will substantiate their claim.

In fact, there is no documents from anybody. I'll be happy to give the Court -- we don't have the actual transcript back from Horace Boddy's deposition, at least I don't, but the court reporter I know e-mailed the transcript to both me and Boddy attorneys, and I did have the chance yesterday to print off Horace Boddy's deposition, and I have copies for both Plaintiff's counsel and for the Court of Mr. Boddy, Horace Boddy's testimony where he says, all of the claims in the lawsuit, all of it, is substantiated by his memory. No documentation and not just no MDOT documentation, there isn't any Boddy documentation to support these claims. It is his memory.

He said he lived on the job. He knows. He knows how these numbers come to be, but there is no documentation at all.

Exhibit B, Horace Boddy's testimony, his testimony says on several occasions there were four MDOT people that told him, "Don't put it in writing. You don't have to. We'll take care of you. Written notice isn't required." These conversations apparently occurred at these weekly and/or bi-weekly meetings between MDOT and Boddy.

Judge, the person or party that kept the minutes of those meetings is, Boddy Construction.

Horace Boddy tape recorded those meetings. He doesn't have the tapes anymore, but the meetings themselves -- the minutes, excuse me, were taken by Boddy, either employees or people that Boddy hired to come to these meetings and take the minutes.

If you look at their brief it's kind of interesting. There weren't any meeting minutes from any of these alleged conversations. There is no meeting minutes attached to their brief that says, "Here is a reference to where MDOT waives this notice requirement." There aren't any such minutes because no such conversations ever occurred.

If that had occurred at one of these meetings, Mr. Boddy testified that Bob Tiura, I believe he said, from MDOT, and this is about every meeting that he attended, would tell them, "Don't worry about the notice requirement. Don't worry about it. We'll take care of you." So it should -- these meeting minutes should be full of references from MDOT personnel saying, "We're waiving the notice requirement. Don't worry about it."

There isn't one meeting minute attached to their brief. Not a single one. They're not there because it didn't occur.

The last thing they attached in support of

their waiver argument is Exhibit A, the Michael Aeck deposition. I, frankly, don't see any reference at all to anything in his testimony that would indicate that MDOT waived anything. I think they have attached that to indicate that it was kind of a bullet-on-the-fly kind of project.

Michael Aeck was only there during the first year, and that's when all of the utility problems were there. And we agree there were problems with the utilities where they were showing on the plans and what was actually out there. That's part of the reason they were paid an additional 1.7 million dollars. So Michael Aeck is correct in his testimony. Yeah, there were problems on the job, initially, when Michael Aeck was there. Mike Aeck wasn't there when any of the paving work was completed and the geotextile separator and any of the driveway work --

THE COURT: What is a geotextile separator?

MR. BRICKEY: What is it?

THE COURT: Yeah.

MR. BRICKEY: It's a fabric that's designed, according to the plans, to separate sand in the aggregate, the materials, and drains the --

THE COURT: I understand what it is.

MR. BRICKEY: Okay. Which is an issue in

this case because their contention is the plans only show it from inside edge to inside edge drain.

That isn't what Gene Koglin and Mike Aeck, both MDOT people, showed John Zimmer, Boddy's project manager, when it came time to place that project fabric. They showed it going up around the -- past the edge of the drain, lapping back up, and sitting where the curb will ultimately go to keep the fabric, the material, out of the drain.

If you stopped it on the inside of the edge drain, the outside edge of that drain isn't protected. So it doesn't make sense, their argument, but, in any event, that's what Mike Aeck and Gene Koglin told Boddy's manager, project manager, and that's when Boddy's project manager testified, "Well, I may not have agreed with it, but I didn't tell them we were going to file a claim. I didn't tell them I'm disputing it." So it's no surprise we don't have any records. We don't have any reason to.

I'll be happy to give the Court that letter that I received from Ralph Langdon. Let me just quote his first paragraph, responding to Horace Boddy's -- and if I didn't have the dates correct, Horace Boddy's letter was dated April 16, 1997. Ralph Langdon's response is April 28th of 1997.

It says, quote:

> Geotextile separator was placed in 1995 and 1996. Your notice of claim dated April 16, 1997, is untimely, according to Section 1.05.12(a) of the 1990 Standard Specifications for Construction. MDOT has no records to support your additional costs.

End quote.

I don't know how much more clear that could be. In 1997 we're telling them, you didn't give us any notice. We don't have any records, not like 1999, like the brief wants you to believe.

Now, basically they are asking this Court to conclude that the contract, the written contract, was modified by these verbal exchanges that aren't reflected in any meeting minutes. In order to modify this contract, there has to be mutual consent and some consideration. I can't think of any consideration that MDOT would have received by waiving this notice requirement. They are going to say it sped up the job. It got the job moving, but that doesn't make sense because giving written notice isn't going to slow anything down.

If they gave us written notice, we would start keeping records. If we couldn't agree on -- if they give notice of the claim and MDOT agreed it was an extra, first we'd try to work out a price. If we couldn't agree on a price, then each side keeps records. That's what happened. That's not going to slow anything down. It's still going to keep the work going. The job doesn't shut down because a contractor thinks they have a claim going. It means parties have to keep the records. That's what happened on several other items where John Zimmer testified he would compare Boddy's records with MDOT records, with MDOT personnel. That's what happened on other items. Didn't happen on any of these.

Would the Court care to have the pages of the Horace Boddy's testimony and John Zimmer's testimony or Ron Boddy's testimony?

THE COURT: I would like it, but I would like it at the end of the hearing.

MR. BRICKEY: Thank you.

THE COURT: Counsel.

MR. SCOTT: For the record, your Honor, my name is Lawrence Scott. I'm representing the Plaintiff in this matter, Boddy Construction. If I might take a moment at the outset to respond to what I believe the

since then, or that someone --

THE COURT: There's nothing in front of me, on the other hand, extracurricular that substantiates SEG has somehow been banished from doing work with MDOT because of this shoddy job that they did in Port Huron.

MR. SCOTT: Only the testimony from all of the different MDOT personnel that I took that said --

THE COURT: Rather low level folk.

MR. SCOTT: Well, inspectors up to Mr. Savas, who was the district or regional engineer, if you will. That's as high as the depositions went, is in terms of Mr. Savas, and no one who said they had any experience with dealing with SEG.

Mr. Aeck's testimony, which Mr. Brickey brings into question with regard to why it's there, that was only there to -- not to talk about the notice requirement but, rather, because he was there the first year. He was an inspector on the job. And if you look at his testimony, you'll see that he references this job as a design-build project that we designed and built it in the field because there were so many problems with the plans. So only in the sense of the conflicts with the utilities and the difficulties with the plans, it was the first project like this that went forward.

Court's initial question was with regard to the typical MDOT contract. I take exception to Mr. Brickey's representation to the Court that this was the typical MDOT contract.

The reason for that is, is that this partnering concept is something that was brand new on this project. It was not a concept that any of the MDOT inspectors or the district engineers were familiar with. And, in fact, in the depositions that we've taken, and we've taken extensive depositions in this matter of a number of MDOT personnel, they all said the same thing; that this was the first time they had to deal with that concept. That this is the first time that they had to deal with an outside engineer doing a set of plans.

Maybe there was an engineer that did outside plans for MDOT prior to 1995, but none of the personnel from MDOT associated with this job had ever worked with an outside set of plans. None of the personnel in this job had ever worked with SEG, the contractor who drew the plans, and no one has ever worked with SEG since.

So to the extent that there may be some testimony or Mr. Brickey's argument extracurricular as it may be in this case, because it's certainly not part of any record before your Honor, that SEG drew plans

Now, to move on to what I believe are our arguments, with regard to what happened with this job, there were a number of conflicts and there were a number of delays. No one is arguing with that, and no one is not conceding that that is -- that wasn't the issue. Mr. Langdon's testimony says clear as day, yes, there were problems; yes, there were delays; yes, there were a number of issues.

Mr. Langdon's testimony, the district engineer, the guy who's ultimately in charge of the local level on the job, and my opinion, your Honor, says it best, Mr. Langdon was very candid in his deposition, and he has one quote in there that I think summarized this case. He says, "If it's an extra -- if it's an extra and MDOT agrees with it, it's just an extra. But, if it's not and MDOT doesn't agree with it, then it turns into a claim." Well, that's not what the specifications called for.

That's not what happened in this case. Initially in this case they were presented with some 14 different claims that Mr. Langdon reviewed. Three of those claims were resolved in negotiations between themselves and the contractor. Not all of those claims were resolved on the basis of written documentation kept by MDOT. They were resolved on the basis of

negotiations.

They had to do with the relocation of the 36-inch sewer that your Honor referenced. That had to do with some pumping because the sewer connection was never available. The sewer connection is still not available, and the project is still not finished out. They still have $5,000 of retention money on our project. Even though we left this project in 1996, this project is still not completed because there were problems with connections to the sewer at the ultimate end of the project, but there was some digging, there was some pumping, and there was a relocation of the sewer.

All claims that were resolved were as a result of negotiation and not necessarily on force account records that were kept because we know there was a claim coming, there were three claims that were dismissed by the contractor.

THE COURT: But the original contract contemplates that if they have documentation, they can pay you?

MR. SCOTT: That's correct, your Honor.

THE COURT: What's your problem there with paying those three claims?

MR. SCOTT: I don't have a problem with those

three claims. All I'm saying to you is that it's indicative of the behavior that took place in this project. That's -- that's not Mr --

THE COURT: Are you suggesting that doesn't happen in other contracts?

MR. SCOTT: No. I'm suggesting it happens all of the time. What I'm saying --

THE COURT: So this isn't really an unusual contract then.

MR. SCOTT: Not in that respect, your Honor. Not in the sense of the language that's sometimes altered by the conduct of the parties in the field.

I've spent 22 years representing contractors, and I know it happens every day. Strict adherence to the language in this contract doesn't happen. Mr. Langdon says that in his deposition. He comes out and says, "Well, let's look at what happens here," and if you read the portions of the transcript from his testimony, first of all, there has to be a dispute before there is a claim. That's not the language.

The specification says that you have got to give notice. "We've got to give you notice of the claim. We don't know if there is going to be a dispute. We've got to tell you there's not going to be notice of a claim."

Mr. Langdon says, "First of all, there has to be a dispute before there is a claim." And then he goes on to say, you know, "Would you agree with me --" I am sorry. "If it's an extra, and MDOT agrees with it, it's not a claim. An extra is not a claim."

Well, this flies in the face of what Mr. Brickey just said about how this contract went from 6 million dollars to 7.3 million dollars.

There is not mountains of written change orders. There is one and a million three worth of extras, over 20 percent of the contract balance. There is one written change order. Now, this same contractor has since done a similar job for MDOT, similar in size and nature, similar in scope and similar in location, and there were 189 written change orders. There is recommendations altering the price because that's how they get the contract price from 6 million to 7.3 million dollars. That's because there are extras that they approved.

If it's an extra and MDOT agrees with it, it's not a claim, but the notice provision says it's a claim before you start the work. That's not what really happened in this job. So what happens in this job now is we've got -- started with 14 claims. We settled three, dismissed three, and eight of them were

consolidated into six. They are not quarrelling with the notion that the work wasn't done with regard to these six, and they're not necessarily quarrelling with the notion that the work got done by Boddy Construction Company at extra time and extra cost.

It's not, for example, as Mr. Brickey would suggest, that Mr. Boddy had all of this in his head, and I'd like to take for a moment, if the Court would, an example of probably the singular best claim, that being the claim with regard to this geotextile separator and talk about that and how that comes about.

THE COURT: Do you agree that it was first brought up in 1997?

MR. SCOTT: The claim?

THE COURT: Mm-hmm.

MR. SCOTT: No, not at all. In fact, there's letters attached to ours showing as early as 1995 when Mr. Brickey referenced them.

THE COURT: All right.

MR. SCOTT: He referenced the letter in '95. The project started in June or July of '95, and I think the letter is dated September of '95.

This geotextile separator, as your Honor said, first, it refers to a drawing, and there is a huge dispute with regard to the drawings because if you

look on the drawing, there is a line, and this is not clear where the line ends. So the first dispute was, where do you have to install this separator fabric to and until where?

MDOT's position is you were supposed to install it around the curb into the aggregate and underneath the curb. All of the testimony agrees. There is no dispute. It's uncontroverted that that procedure didn't work. It's uncontroverted that no one from MDOT forgot that Boddy -- it was Boddy's first job. No one from MDOT had ever seen this fabric used in that fashion before or since on any jobs, but in this job their position now is that that fabric was supposed to be installed around the edge of the curb and tucked under before the curb was installed.

It's also uncontroverted what happened is when they brought the machine in to install the curb, it would snag the fabric and tear it apart. So they stopped that immediately. And instead they had them take the fabric and just stretch it out behind the curb, and they had the curb machine come in and install the curbs. And then what they did is, the inspectors instructed Boddy to cut this fabric into 18-inch strips and install it by hand up against the back of the curb 2.2 miles in each direction.

Now, Boddy gave them all of the documentation with regard to it. It took a five or six-man crew. They had to do this many feet a day. This is how long it took us. This is the extra cost. What is not disputed here? What's not disputed is that's the instructions we got from MDOT: Cut it in 18-inch strips and put it in that way.

What's not disputed is there is no specification that could possibly even be interpreted to instruct Boddy to do it that way. That Boddy did not contract to install it that way. What is not disputed is that it is done. Mr. Koglin testified, he witnessed it being done. So what they're disputing is we didn't keep specific records with regard to how many people were doing this on each day, but they're not arguing that they told us to do it this way. They're not arguing that it was never specified that way, and they're not arguing that we did it.

But, we did it because we were told to do it consistent with other issues that we were told to do, some of which we were paid for now, some of which we're not being paid for. That is consistent with the behavior and the testimony that's come out in this case.

Again, Mr. Brickey brings up the testimony of

Mr. Savas and a couple of others that says, "Today, if we had the documentation, we would pay for it." That, to me, flies in the face of the whole basic premise of his argument for the motion for summary because what they're saying is that, notwithstanding the notice requirement, "If we agreed with your documentation, we --"

THE COURT: Isn't that exactly what the contract says? That if there is documentation in their records, they'll pay it?

MR. SCOTT: I don't disagree with that, Judge. I'd be foolish to stand here and tell you that's what it says. The literal reading of that is true. Our argument is, if you behave a certain way, if you induce us to do a certain thing, if you ask us to do a certain thing and rely on your representation, you can't then take a position later on to our detriment and say, "Well, now I'm not going to abide by what I told you earlier" and go back and say, "Now we're going to adhere strictly to the contract."

The parties, and I think clearly, modified the contract, waived this provision by their own language. And again, I hate to beat a dead horse, but Mr. Langdon, I mean, is -- I think says that. If you read his deposition transcript, it's critical, but it

says "That's not the way we did it. The contractor does the work."

THE COURT: Okay. So the state legislature passes a law that says that any contract, in a given amount, has to be approved by the ad board. Any modifications must be approved by the ad board. And somehow I'm supposed to look at this and say, "Well, well, Mr. Langdon says, 'Hey, we're going to move this project, no problem. You go out and do it, and we'll sort this all out at the end.'" Is that about what you're saying?

MR. SCOTT: Your Honor --

THE COURT: Mr. Langdon trumps the state legislature?

MR. SCOTT: Not at all, not at all, but what I am saying to you is that in this particular incident, that's what happened. Mr. Langdon did it. There is a contract that you're --

THE COURT: Let's assume he did it. Let's absolutely assume he did it. So what.

MR. SCOTT: And the State approved it.

THE COURT: How did the State approve it?

MR. SCOTT: Because Mr. Langdon approved certain change orders.

THE COURT: Doesn't the law require

modifications of a contract to be made by the administrative board or to be made in writing? I mean, otherwise there -- there's -- otherwise, there is no way to protect the state from the unscrupulous inspector and the unscrupulous contractor, is there?

MR. SCOTT: Well, in this particular instance, your Honor, if -- if Mr. Langdon, and I'm not suggesting that he's unscrupulous or that the contractor in this case --

THE COURT: And I am not either, but that is -- that's -- that's how I understand the law to be structured, and help me if I'm wrong here.

MR. SCOTT: But, Judge, the only thing I can suggest is that -- is that the circumstances surrounding this particular contract suggests that that wasn't the way this particular case was done. And in fact, the ad board approved certain recommendations by Mr. Langdon involving certain claims that didn't follow the notice requirement. If they had taken this position with me early on, early on if they had said when the very first claim was submitted, "Sorry, you didn't follow the notice provision," I would agree with your Honor that, you know, that's in compliance with the law, and I shouldn't be here.

But in this particular case, the state, by

its own admission, has said we had a different program here. And in settlement of some of these claims, they -- Mr. Langdon wrote his recommendation. And what did the ad board do in this case? They approved it. They approved it. That changed for the sewer. It's significant. It's a couple hundred thousand dollars. We're not talking about 10 or $20,000 here. They approved it.

So what you've effectively done, if you were to follow that to its logical conclusion, is say Mr. Langdon is the arbiter of all claims. If he approves them, fine. And if he doesn't, you're just out of luck because, otherwise, you don't have a chance. You don't have anybody overlooking Mr. Langdon to say whether or not the submission of your claim is a question of fact, whether or not you did provide the proper documentation, whether or not somebody should consider that claim to be legitimate.

In this particular case, we did what we were told. We completed the project on time in spite of some very difficult situations. There was never any letters or any type of correspondence or communication suggesting that Boddy was not effective as a contractor in spite of the fact that this was their first job as a prime or general contractor. They completed the

project on time.

And in this particular instance, did so with, like I said, one written change order.

There are a number of other claims that we have presented. There is some six in total. None of those claims were presented at the district or the regional or the COR level on the basis of Mr. Boddy's memory. Contrary to Mr. Brickey's suggestion or assertion, your Honor, each of those claims were submitted with detailed analysis and are submitted here with detailed analysis of how we got to those numbers, how we made reference to the work that was done.

And in each particular case I have yet to hear anyone say that the work wasn't done. I haven't heard anybody say that the objective wasn't accomplished. I haven't heard anyone say that the installation, for example, of 18-inch strips of geotextile separator behind a curb by hand is something that was foreseeable in this contract.

I'll give your Honor the specifications and the plans and if you can look at that and come to that conclusion, that this was somehow foreseeable, than you'd have to rule in favor of the State.

THE COURT: I don't know. I don't build highways. I am having a heck of a time building a

courthouse right now.

MR. SCOTT: I appreciate that, Judge.

THE COURT: But, you know, the contractor comes in and says, "Gee, I didn't know you really wanted baby changing stations in those bathrooms, and I didn't know you needed a white board in the courtroom."

I sure thought all of those things were there. We thought, when we talked technology, we were talking the same stuff, and if we're talking evidence presentation systems, there is a language we talk.

Now, I assume when you build a highway, you're talking geotextiles. Perhaps there is a common language you talk too. What I want to talk about is this letter from September 7, 1995, from Mr. Zimmer, and then not quite two months later, October 25th, from Mr. Body -- er, Mr. Boddy, excuse me, in which he says at the very end:

> In the future, extra work or work requiring materially altered methods or different materials due to changed conditions or character of the work will not be commenced until receipt written of a work order directing performance of the work and authorizing agreed upon

compensation --

When did that change?

MR. SCOTT: When he went out to the job site, and everybody -- his testimony is not -- nobody is saying Horace Boddy, he didn't say this. Nobody will say he's a liar. When he went out to the job site after presenting this letter, they said, "Don't worry about it. We'll take care of you. We'll get this job done. This is an important job for the State. This is the first one of its kind like this. Let's get this job done, and we'll get it done."

He -- I mean, Judge, just think about it on the flip side of that. It's ridiculous to think he'd sit down and write this in November of '95 and not receive any assurance and continue to work all through '96 at break-neck speed because none of -- the paving that was supposed to occur in '95 lapsed. It got delayed. All of it got pushed into '96 and still got done on time.

And to write this letter, which, candidly, I had seen before it was sent out, to write this letter and not receive some assurance from the State and say "Okay, let's get this job done, and we'll take care of it in certain instances," that's what happened. They took care of it. The problem is we're down to the ones

that we disagree about with regard to being taken care of. There's no other way to explain it.

THE COURT: Anything further?

MR. SCOTT: Pardon?

THE COURT: Anything further?

MR. SCOTT: No, your Honor.

MR. BRICKEY: Apparently I was wrong when I said that they're conceding that written notice wasn't given because if I heard Mr. Scott correctly in response to the Court's question of whether they would agree that this wasn't given until 1997, he said, "No, I don't agree with that; it was given in 1995," which apparently is the letter that the Court was asking a question about.

That's contrary to their responses to my request for admissions. That's contrary to page 5 of its brief that it submitted in this matter. So I am not sure anymore whether we're still fighting about whether written notice was given or not. I thought that issue had resolved itself.

There is a difference, despite what they want the Court to believe, between a notice of a claim -- notice of intent to file a claim and an actual claim. Mr. Langdon said, "It isn't a claim unless we disagree." That's true. The contractor -- what they

failed to give MDOT in this case is a failure of their notice of intent to file a claim. That's what happens, they give us their written notice of intent to file a claim. That way we, MDOT, know they intend to file a claim.

At that point the parties sit down, try to reach an agreement on a price. If they reach an agreement on a price, fine, there is no claim. That's true. That's what Mr. Langdon said. That is correct. If they don't agree on a price, then in this case, the contractor, Boddy, keeps its records, MDOT keeps its force account records. At the end of each day they compare the records. That's when it's a claim, when they don't agree. If they don't disagree, there isn't a claim. I agree with what Mr. Langdon said. I don't see how it could be any other way. If there's no dispute, there's no claim.

I am not sure how that violates these standard specifications. That's what it said, and they're required -- under 1.05.12 they're required to give written notice to file a claim. That puts MDOT on notice. That's when MDOT keeps its records. There aren't any records in this matter because they never received that.

One statement Mr. Scott said was he hasn't

heard anybody dispute whether the work was done. The fabric was placed. I'll give him that. The fabric was placed. That's what the plans called for. That's what John Zimmer, the Boddy project manager, and Gene Koglin and Mike Aeck sat down and discussed one day exactly where it needs to be placed. That's when John Zimmer testified he didn't tell anybody from MDOT at that point that he disagreed or there was a claim coming. That didn't happen.

Was it placed? Absolutely, it was placed. It's placed because the plans also described what the purpose of that fabric is. And, like I indicated to the Court, it's to separate this stone and the sand and the aggregate and different materials from each other in going down into the drain. That's what its purpose is stated as.

Now Mr. Boddy testified he didn't see anything in the plans that indicated the purpose of the fabric. I'll believe him. I believe he didn't see it. I believe he didn't even look. They had four days to get all of their bids together from subcontractors and submit its bid to MDOT. I don't disagree that he didn't see it. He worked with his son, Ron Boddy, in putting the bid together. He didn't see it either, but it's there, and that's where they placed it. So, no, I

am not going to dispute the fact that it was placed.

They've been paid according to the contract terms. The pay item is from inside edge drain to inside edge drain. That's what they've been paid for. The laps and tucks, it's specifically spelled out as well that those aren't paid for. You have to put it there, but that isn't part of the payout for fabric. So take that into consideration when you place your bid per linear foot of this fabric. It's all in there.

THE COURT: Does the -- er, rather, do the specs specifically reference laps and tucks?

MR. BRICKEY: Yes.

THE COURT: Do the specs specifically reference that you are not paid for laps and tucks?

MR. BRICKEY: Yes.

Again, I don't think it matters, but the $5,000 being held in retention, that's because Boddy hasn't submitted its affidavit and surety bond information. That's what we're waiting on. That's what MDOT has been waiting on for quite some time now. So that's what needs to happen in order to close this out, to final this job, and release the $5,000. We're waiting on Boddy to submit some documentation. Again, another documentation problem.

Now, in response to the Court's question,

they wouldn't agree that 1997 was the first time they gave notice on these claims. And part of what I'll give the Court when I am finished, if the Court would like it, is the letter, April 16, 1997, from Horace Boddy saying:

> Pursuant to MDOT 1990 Specifications for Construction 1.05.12, this constitutes our written notice of intent to claim additional compensation for costs incurred due to a significant change in the character of the work as directed by MDOT personnel of installing the geotextile separator vertically against the back of the curb.

That's his letter. And MDOT's response was 12 days later saying, "You didn't do it timely. We don't have any documentation."

Unless the Court has any other questions, I don't have anything further other than to present the testimony that I've described. I'll be happy to discuss Horace Boddy's testimony that I'm going to give to the Court in further detail, if the Court wishes.

THE COURT: Thank you, Gentlemen. You both

referenced documents that I don't have. Provide me with the documents by 5 p.m. this Friday. The matter is under advisement.

MR. BRICKEY: Thank you, Judge.

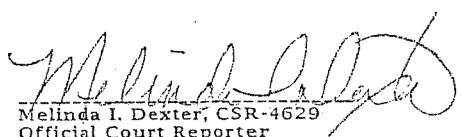
(At 9:58 a.m., the matter is concluded.)

STATE OF MICHIGAN)
) SS.
COUNTY OF INGHAM)

CERTIFICATE OF REPORTER

I, Melinda I. Dexter, Certified Shorthand Reporter, do hereby certify that the foregoing 45 pages comprise an accurate, true, and complete transcript of the proceedings and testimony taken in the case of Boddy Construction Company, Inc. versus State of Michigan, Michigan Department of Transportation, File No. 00-17592-CM on Wednesday, May 9, 2001.

I further certify that this transcript of the record of the proceedings and testimony truly and correctly reflects the exhibits, if any, offered by the respective parties. WITNESS my hand this the twenty-fifth day of November, 2001.



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STATE OF MICH
IN THE COURT OF MS

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff(s),

vs

Case No. 00-17592-CM
Hon. Peter D. Houk

STATE OF MICHIGAN,
MICHIGAN DEPARTMENT OF TRANSPORTATION,
Defendant(s). /

Deposition of **HORACE BODDY**, taken in the above-entitled matter before Stenograph Reporter, Kelly Forfar, at **12900 Hall Road, Suite 350, Sterling Heights, Michigan** on **Monday, April 30, 2001**, commencing at about **11:00 A.M.**

APPEARANCES:

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INDEX OF WITNESSES

EXHIBITS

(Exhibits retained and attached by reporter.)

Sterling Heights, Michigan
Monday, April 30, 2001

D E P O S I T I O N

(On record at about 11:28 a.m.)

HORACE BODDY

was called as a witness, and having been first duly sworn, was examined and testified as follows:

MR. BRICKEY: Let the record reflect this is the time and place of the taking of the deposition of Horace Boddy taken pursuant to Notice and stipulation to be used for all purposes allowed under the Court Rules.

EXAMINATION

BY MR. BRICKEY:

Q. Will you please state your full name for the record.

A. Horace Henry Boddy.

Q. Have you ever had your deposition taken before?

A. Yes, I have.

Q. I know you have sat through all of the depositions in this case so far and you told me you have had your deposition taken before. We're still going to cover a couple of ground rules. As you know, you have to give a verbal response to my questions. You can't shake your head yes or no or say huh-uh or uh-huh, things like that. If you have trouble hearing me or understanding me, let me know and I will be happy to repeat or rephrase the question, okay?

A. Correct.

Q. If you answer my question I am going to assume that you both heard it and understood it; fair enough?

A. Yes.

Q. What is your current address?

A. 849 Crystaline, Marysville Michigan.

Q. The Deposition Notice that I sent to you, through your attorneys actually in this case, asked you to bring several documents and things with you. Did you bring anything to the deposition?

A. All I did is bring two pieces of filter fabric.

Q. Filter fabric?

A. Yes, the rest counsel has had.

Q. Number 6 on my Deposition Notice that I had sent off to you on the second page said to bring all Michigan Department of Transportation records that substantiate Plaintiff's claim relating to reconstruction on the I-94

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kept in September of '95, there should be some reference in there to this conversation that you had with Noel Smith and Ralph Langdon about fabric and additional compensation for that item?

A. I haven't reviewed them records in a long time, I think there is but I ain't going to say today.

Q. Is there or isn't there? Who actually kept the minutes?

A. John Zimmer.

Q. And is it true that you had a tape recorder during these weekly meetings?

A. Yes, it was.

Q. And you recorded the meetings?

A. Yes, we did.

Q. And do you still have those tape recordings?

A. No, we don't.

Q. What happened to them?

A. I think John taped over them.

Q. John Zimmer?

A. Right.

Q. You don't have any of the tapes of any of the meetings from this project?

A. I don't believe so.

Q. Okay. Now the issue of fabric obviously was a pretty important issue to you, you had some screaming matches

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with Ralph, right?

A. Right.

Q. And that would be important enough to keep in the meeting minutes, right?

A. Yes, it was.

Q. And what about the issue of having to remove and replace the temporary aggregate for the driveways, that's another important issue to you?

A. Yes, it is.

Q. And was the issue of additional compensation for that method discussed at the meeting minutes -- or at the meetings?

A. It was discussed several times that they never should have add the quantity of gravel to the item of concrete under pavement -- aggregate under pavement. It should have been said as maintenance gravel. And that's the way it is in the meeting minutes, that the gravel should be added as another paid item called maintenance gravel to go along with the specification of 1990.

Q. Boddy was actually paid for all of the material it placed in the driveways, right?

A. Paid one time.

Q. Okay. Now, the issue of payment again, again that was discussed at the weekly meetings?

A. Yeah, first it got to be a known subject and they

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said they were going to take care of me at a later date.

Q. And who made the statement to you that MDOT would take care of you on a later date for the payment for the removal and replacement of the temporary aggregate?

A. We asked MDOT right at the beginning if work orders would be issued to us on this project and we had to state to them whether we were going to file a claim. And they had so many changes at the beginning. They said they didn't want to issue no work orders, which at the end of the specification they had to do it. So they didn't file the specification and they said I didn't have to file the specification for claim, they said they would take care of it at a later date.

Q. That was all stated at one of these weekly meetings?

A. Yes.

Q. And all of that conversation would be reflected in the minutes?

A. I don't think that -- the way I just said it was a hundred percent the way it is in the weekly minutes.

Q. There should be some reference to MDOT's statement that you didn't have to file a claim?

A. I don't think they called it a claim, they called it no paperwork, they didn't call it a claim. Just like their work orders, they didn't call them work orders, they

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never issued them.

Q. Did anyone from MDOT tell you or anyone else from Boddy that Boddy did not have to file a Notice of Claim in this case?

A. Yes, Gene Coglin -- Ralph Langdon did, Noel Smith told me, and even Jim Hansen after he come aboard for Noel Smith also said it is too far along, we don't have a Notice of Claim.

Q. When Jim Hansen said that, the work had already been completed, correct?

A. No, we were still out there on that project.

Q. Had the work already began on which the claims were based?

A. Yes.

Q. When did Gene tell you or someone else from Boddy that Boddy didn't have to file a Notice of Claim?

A. I think the first one was when we really got into jumping around with the sewers, how were they going to pay us for moving machinery from one end of the job to the other end. But that finally got settled.

Q. Let me ask it this way. Did Gene Coglin or anyone else from MDOT ever tell you or anyone else from Boddy that it did not have to file a Notice of Claim for any of the issues involved in this lawsuit?

A. Yes, they did.

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Q. Okay. And who was that?
A. Gene Coglin.
Q. Anyone else?
A. Ralph Langdon and Noel Smith and also Jim Hansen, because them items that were filed in the lawsuit about has already been started.
Q. Did anyone from MDOT tell anyone from Boddy that a Notice of Claim was not required for any of the issues involved in this lawsuit before the work began?
A. Yes, they did.
Q. Same people?
A. Yes.
Q. All of them?
A. I say yes right now.
Q. When did Gene Coglin tell someone from Boddy that a Notice of Claim was not required for any of the items involved in this lawsuit?
A. I think the first one, when they went down there and he told us to cut the driveways and put a -- for a layer that is shown on the blueprint.
Q. In June of '95?
A. June or July of '95.
Q. Okay. Any other times?
A. When we got in the big hassle over the fabric.
Q. In September of '95?

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A. Yes.
Q. Did Gene Coglin attend the weekly meetings?
A. When -- if he made it from Capac to the job site, yes.
Q. Did Gene Coglin ever tell -- or make the statement at one of the meetings that a Notice of Claim is not required?
A. Either Gene Coglin did or Bob Tiera.
Q. That's a new name you hadn't mentioned yet.
A. Right.
Q. Anybody else from MDOT that made the statement about don't worry about filing a Notice of Claim?
A. Not to my knowledge.
Q. And Bob Tiera made that statement at a weekly meeting?
A. He made that statement at all of the weekly meetings until he was transferred.
Q. I am sorry, I didn't catch that.
A. Until he was transferred.
Q. Bob Tiera said it at every meeting until he was transferred?
A. I am not saying every meeting, there was a lot to discuss and that would be -- after we got off the real important issues, what sewers are going to be relocated or what you are going to do here, Ralph. You had to take care

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of the business and in order to keep that job going or else that job would never be done today.
Q. Okay. When did Bob Tiera make those statements, I don't know when he was transferred, so --
A. I would say he was transferred in 1996, but he was there in '95 when the job was going.
Q. So there should be some meeting minutes that Boddy kept that would indicate that Bob Tiera from MDOT told Boddy that a Notice of Claim is not required?
A. It is very brief in the minutes, whoever told us it just says no paperwork required, you know, a very slight hint on it, not a big paragraph. I worked with these people for years, Noel Smith and them, and I thought their word was as good as gold.
Q. So is it based on that statement, that you didn't think it was necessary to file a written Notice of Claim?
A. Not when they were not going to give us no work orders.
Q. I am sorry?
A. When MDOT wasn't going to give us work orders for changes, I didn't think I had to file it and give them a Notice of Claim.
Q. And that was in June and September of '95?
A. Right.
Q. When did you first realize or come to the belief

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that MDOT was going to require a Notice of Claim?
A. I guess after we filed this lawsuit, because then they were in some of your paperwork that we had to answer back a Notice of Claim was not filed properly, and I guess that's the first time I ever heard that the Notice of Claim had to be filed on this job.
Q. Okay. So before this lawsuit was filed, you didn't believe that you had to file a Notice of Claim?
A. No, because all of our paperwork went out and they never answered -- you know, they got seven days to answer paperwork, and that never happened on any of it.
Q. Okay. When did Noel Smith tell you or anyone else from Boddy that Notice of Claim wasn't required?
A. At the second job meeting.
Q. Okay. So at one of the official meetings?
A. Right, because we were changing -- because I was going to make a claim for moving machinery here and all over because we dig a hole here, your gas line is in the way, the sewer wasn't there, so they paid us like exploratory trenching for some of it. And, you know, we could have shut the job down and we can charge him blue book prices for the equipment. They couldn't afford that and I couldn't afford that.
Q. Okay. When was the second meeting that -- where Noel Smith told Boddy that a Notice of Claim wasn't required?

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Q. Is that correct?
A. That's correct.
MR. SCOTT: Wait. For the record, you are -- are you talking about any payroll documents.
MR. BRICKEY: I am talking about for this figure of $112,880.16.
Q. (BY MR. BRICKEY): Did you ever tell any drivers from Boddy Construction to turn load tickets into the state for this job when the material, the temporary aggregate, was actually brought to a different location?
A. If that ever happened, Dave, I would have fired the guy right now.
Q. Did you ever tell any drivers to do that?
A. No, no way.
Q. The next amount in the Complaint, paragraph 11, is a request for additional compensation for the cost to excavate and dispose of temporary aggregate off site in the amount of $91,407.37.How did you calculate that number?
A. The truck drivers used to turn in load tickets to me or tell us what to use to do it, and I don't know if those tickets are still around or not, but that was with -- that was contaminated stone. The stone was supposed to be originally set up and the same underneath concrete. It got contaminated and it was not even good for driveways, it made mud every time it rained and that's where that stone is.

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Q. And how did you come up with the $91,000 figure?
A. We figured how many times -- trucks are worth so much an hour and the machines worked so much an hour and the operator works so much an hour, the truck driver works so much an hour, and I come up with that figure on the pad, just think of one night, and I don't know if that hand scratching is even around.
Q. Is that figure $91,407.37 supported by any documentation?
A. I don't know if it is still around, Dave, or not.
Q. The documentation that -- that you are not sure whether it is around or not, what would that be?
A. Just a yellow pad.
Q. Your handwritten notations?
A. Handwritten notations.
Q. Where was this temporary aggregate that was removed from the site, where was it brought to?
A. 200 14th Street was my existing office building.
Q. If I recall, I think it was your son David Boddy who told me that has been sold?
A. Yes, it was.
Q. Maybe it was Ron that told me.
Now when you sold that business, was the temporary aggregate still there?
A. If it was, we bulldozed it down, there were no

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piles.
Q. When did -- when was that business sold?
A. I think '97 and '98.
Q. Was all of the temporary aggregate that was hauled off site brought to that location?
A. No.
Q. Where else was it brought?
A. It was put down where Tony Angelo had a piece of property, where the cement plant was put in there, we took it to that property, too.
Q. Anywhere else?
A. Not to my knowledge.
Q. Did Tony Angelo pay you for that material?
A. No, we took it back.
Q. I am sorry?
A. We took it back to -- took the stone back to the driveways.
Q. So you reused it?
A. Right.
Q. When you placed it in the driveways, were you paid for it?
A. No.
Q. Was that just like a storage site for you?
A. Yeah, storage site.
Q. All right. Any of the aggregate that you brought

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to your old business that wasn't reused on the job, was any of that sold?
A. Not to my knowledge.
Q. Was any of that material used on another project?
A. No.
Q. How many tons of material was actually hauled off the site and stored or brought to your old business?
A. I would have to clarify it for you but probably about 2300 ton.
Q. Okay.
A. A little more than that, probably about 2500 ton.
Q. And is that based on any documentation?
A. That is based on the material we put out for wintertime shutdown that Ralph Langdon paid us for putting in at wintertime. And it come springtime, he paid us to dig that material out, we trucked it back to the yard, big stockpile, and then he paid again for going back in the driveways, per truckload, as he stated in his deposition.
Q. I am talking about material that was actually brought to your old business and left there and not reused on this job.
A. And I couldn't really tell you, I don't remember a whole lot.
Q. Okay. So since you can't tell me how much there was, you can't tell me how much it was worth; would that be

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STANDARD
SPECIFICATIONS
for
CONSTRUCTION

MICHIGAN
DEPARTMENT OF TRANSPORTATION

tor's directions or while suspended by the inspector will be considered unauthorized and may have to be removed and replaced at the Contractor's expense in accordance with Subsection 1.05.11. In no instance shall any action or omission on the part of the Inspector relieve the Contractor of the responsibility of completing the work in accordance with the plans and specifications.

Any approvals, reviews, and inspections of any nature by the Department, its officers, agents, and employees, shall not be construed as a warranty or assumption of liability on the part of the Department. It is expressly understood and agreed that any such approvals are for the sole and exclusive purposes of the Department, which is acting in a governmental capacity under this contract. Any approvals, reviews, and inspections by the Department will not relieve the Contractor of the Contractor's obligations hereunder, nor are such approvals, reviews, and inspections by the Department to be construed as a warranty as to the propriety of the Contractor's performance, but are undertaken for the sole use and information of the Department.

1.05.10 Inspection.—The Engineer and authorized representatives shall be allowed access to all parts of the work at all times and shall be furnished such information and assistance by the Contractor as may be required to make a complete and detailed inspection. Such inspection may include mill, plant, or shop inspection of materials and workmanship.

Any approvals, reviews, and inspections of any nature by the Department, its officers, agents, and employees, shall not be construed as a warranty or assumption of liability on the part of the Department. It is expressly understood and agreed that any such approvals are for the sole and exclusive purposes of the Department, which is acting in a governmental capacity under this contract. Any approvals, reviews, and inspections by the Department will not relieve the Contractor of the Contractor's obligations hereunder, nor are such approvals, reviews, and inspections by the Department to be construed as a warranty as to the propriety of the Contractor's performance, but are undertaken for the sole use and information of the Department.

Scales, weighing equipment, and other associated devices may be inspected and checked at any time by the Department. Claims by the Contractor for delays or inconvenience due to these operations will not be considered. The Department Scale Inspector will conduct the inspection and checks so as to cause as little interference as possible with the Contractor's operations.

The initial inspection of the Contractor's truck scales or plant scales by the Department Scale Inspector will be made without charge by the Department. If the scales fail to operate within the tolerances prescribed, repairs or adjustment, as necessary, shall be made by the Contractor and the scales will be checked again, provided the repair or adjustment is completed within approximately 3 hours of the completion of the initial inspection.

Should the scale or scales not be set up and ready for inspection, on the date scheduled for the initial inspection, or the repairs or adjustments at the initial inspection are of such magnitude as to require the Department Scale Inspector to return to the site of the scale, the Contractor will be charged $200.00 for each re-inspection made by the Department Scale Inspector.

The Contractor shall provide such necessary equipment and personnel as may be required to facilitate these inspections.

The above requirements for scale inspection will apply to each project or scale installation that requires inspection by the Department Scale Inspector.

1.05.11 Removal of Defective and Unauthorized Work.—Work done without lines and grades being given, work done beyond the lines shown on the plans or as given, work done without required inspection, except as herein provided, or any extra work done without authority may be considered as unauthorized. Work so done may be ordered removed or replaced at the Contractor's expense.

All work which has been rejected or condemned shall be remedied or removed and replaced by the Contractor at the Contractor's expense in a manner acceptable to the Engineer.

1.05.12 Disputed Claims for Extra Compensation.—If any inconsistency, omission, or conflict is discovered in the contract or if in any place the meaning of the contract is obscure, or uncertain, or in dispute, the Engineer will decide as to the true intent.

a. Notice of Claim.—If the Contractor intends to seek extra compensation for any reason not specifically covered elsewhere in the contract, the Contractor shall notify the Engineer in writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim or the Contractor shall notify the Engineer within 24 hours after the commencement of the delay, suspension of work, loss of efficiency, loss of productivity or similar event on which the claim will be based. If the Contractor intends to file a claim based upon the denial of a extension of time request for any reason not specifically covered elsewhere in the contract, the Contractor shall notify the Engineer in writing within 7 days after the Department mails to the Contractor the denial of the Contractor's request for such extension of time. Neither the refusal of the Contractor to sign a written recommendation or work order nor the Contractor's signing a recommendation or work order under protest shall constitute the notice required herein. Failure of the Contractor to give such notification or to afford the Engineer proper facilities for keeping strict account of actual cost of the work or delay upon which the notice of intent to file claim was made will constitute a waiver of the claim for such extra compensation or extension of contract time unless such claims are substantiated by Department records and the extra costs were unforeseeable.

EXHIBIT F

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

BODDY CONSTRUCTION COMPANY, INC.,

Plaintiff,

-vs- Case No.: 00-17592-CM

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant.
_____/

The Deposition of RALPH LANGDON, taken before Pamela K. Lindsay, Certified Shorthand Reporter and Notary Public in and for the County of St. Clair, State of Michigan, at the Offices of MDOT, 3050 Commerce Drive, Fort Gratiot, Michigan, on the 2nd Day of March, 2001, at 10:17 a.m.

APPEARANCES:

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BY: LAWRENCE M. SCOTT, ESQ.
GARY A. HANSZ, ESQ.

Appearing on behalf of the Plaintiff:

DAVID D. BRICKEY, P.C.
Attorney at Law
425 West Ottawa Street
Lansing, Michigan 48909

Appearing on behalf of the Defendant:

Also Present: Horace Boddy

I N D E X

RALPH LANGDON - WITNESS

EXHIBITS

Fort Gratiot, Michigan

Friday, March 2, 2001

10:17 a.m.

* * *

R A L P H L A N G D O N,

being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

MR. SCOTT: Let the record reflect that this is the deposition of Ralph Langdon taken pursuant to Notice and to Michigan Court Rule; to be used for any and all purposes thereunder in the matter of Boddy Construction Company versus Michigan Department of Transportation in the Court of Claims.

Mr. Langdon, we've met before, but I'm Larry Scott. I'm an attorney, and I represent Boddy Construction Company in this matter. I'm gonna be asking you some questions today with regard to the Gratiot Road project, and the contract between Boddy Construction Company and Michigan Department of Transportation.

If at anytime, sir, I ask you a question and you don't understand it, please ask me

during the underground construction work, sewer -- storm sewer work.

Q What types of difficulties were there?

A Private utilities in the way, private utilities not correctly shown on the plans so we couldn't place the sewer on the alignment that was shown. And then we also had a big steam tunnel that was owned by Detroit Edison that was in the way of our construction to the point where we had to go under it and change all of our grades. And it -- there was considerable extra work done the first year.

Q Isn't it true that they actually moved the location of the storm sewer from outside, or in the roadway to outside the roadway?

A I believe it was about a half a mile that we moved it out of the right-of-way line out to the roadway.

Q In your opinion would that have -- not knowing that all of these conflicts with utilities and things were going to be there, would that have interrupted any sequencing from the contractor's point of view?

A Yes, it did.

Q Would it have caused any delay?

A Yes.

Q Okay. Actually, when I say delay I mean delay and extra work, additional work that the contractor had

Q Okay.
A -- but I would -- I would -- if I reviewed it I usually didn't say anything but I considered it.
Q At these project meetings that you talked about, which were weekly or otherwise, was there any discussion at any of these projects about extra work claims?
A Oh, I'm sure there were. We had -- we had many, many extras on this project.
Q And did any -- let me ask you this. Does any particular extra strike your -- strike your memory at all with regard to having formally followed the claim procedure outlined in this extra?
A If it's an extra and MDOT agrees with it, it's not a claim. An extra is not a claim.
Q Right. I understand. But would it end up in the force account?
A My recollection is all the force account records were kept for extra work that we as MDOT recognized the contractor had reimbursement coming. We mainly kept it so we would have some justification for the amount of the money that we recommended that the contractor receive.
Q Okay. Would you agree with me, however, that the claims are the extra works -- extra work that wasn't

accepted or approved?

A That's --

Q Isn't that how it turns into a claim?

A Well --

Q I mean, doesn't it kind of start as extra work?

A First of all, there has to be a dispute before there's a claim.

Q Okay. Right.

A So if the contractor feels he's got additional work or has done additional work or has a problem with the plans or the specifications, there's a discussion about it and MDOT may agree and they may disagree. Sometimes it's in writing and the discussion may be at a weekly meeting. And hopefully most of these things are resolved at that time. But if the contractor does not agree with MDOT's position and wants to go beyond that, you know, he can't accept what MDOT has said --

Q Correct.

A -- so he wants to go farther, that's when it becomes a claim.

Q Was there discussions about any extra work between Boddy and MDOT at these weekly meetings that MDOT and Boddy didn't agree about and it was going to turn into a claim? Was there ever any discussion about

how to handle it or what to do with it?

A The only one I can think of offhand was -- we talked about previously was the relocation of the sewer, about a half a mile of sewer. We felt it could be done for approximately the same price. We used more sand, so we allowed extra payment for additional sand that was used. But other than that we felt it didn't make any difference where Boddy Construction -- Construction placed the sewer, whether it was out at the right-of-way line or under the pavement. And that specifically was discussed at a weekly meeting. And I remember that later Mr. Boddy brought a consultant in to take a look at it and he disagreed with it. And that was one of the claims that later was resolved.

Q Do you recall any conversation between representatives of MDOT and representatives of Boddy where there were claims for extra work or claims, if you will, and the discussion revolved around or resolved by saying let's get the project done and we'll finish -- we'll worry about that later?

A No, I do not.

Q Okay. You never heard anything like that?

A The only thing I heard from Mr. Boddy is he claimed he heard it from another MDOT employee, but it wasn't

Q (Continuing by Mr. Scott): Mr. Langdon, I'm gonna show you what I've identified as Deposition Exhibit Number 2. Those are various sections from the standard specification book. And ask you, for the record, if you can just look through those briefly and identify those?

A It appears that they're excerpts from a 1990 Specification for Construction with the MDOT specifications. It appears to be all of Section 105 under "Control of Work", and Section 1094 and 109 -- correction. 10 -- 1.09.04 and 1.0905, Section 1.

Q Were those the sections which were in effect at the time that this project was constructed?

A They appear to be. They don't specifically say which specification book they came from. But if they're from the 1990 book they would have been applied.

Q With regard to the eight or ten claims that the contract either abandoned or you were able to work out and compromise, do you know if those claims procedures were strictly adhered to?

A Maybe not strictly adhered to. They were possibly adhered to loosely. Most of the time on extra work if the contractor encountered something on a project that we didn't anticipate he's not gonna stop work. He's gonna keep working and accept -- expect to get

extra payment for. Now, normally --

Q That's generally speaking --

A Right.

Q -- the way it goes, right?

A Right. Normally, you know, we don't know how much it's gonna cost. The contractor doesn't know how much it's gonna cost. So we -- even though we agree that the contractor is gonna get reimbursed, we don't really know how much. So we try to keep records of what he does so at a later date we can pay him, even though it's not a claim. It's just extra work.

MR. SCOTT: Can we take two minutes?

MR. BRICKEY: Yeah, sure.

(Recess)

MR. SCOTT: Okay. Back on the record.

Q (Continuing by Mr. Scott): Just by way of the historical background, at the resident engineer's level for this particular project you were the resident engineer when it started were you not?

A Yes.

Q And then you left in '97?

A '97.

Q Okay.

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Via Federal Express

Clerk of the Court
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Re: Boddy Construction Company, Inc., v MDOT
Michigan Supreme Court No: 123833
Court of Appeals No. 237471
Court of Claims No. 00-17592-CM
Our File No. 6956/6

Dear Clerk:

Please find enclosed an original and eight (8) copies of Plaintiff/Appellee's Supplemental Brief with Proof of Service in the above-captioned matter.

Please file in your normal manner and return a "true" copy in the self-addressed stamped envelope enclosed. Please call should have any questions and/or concerns.

Very truly yours,

Lawrence M. Scott

LMS/mb
Enclosures

cc: David D. Brickey, Esq.
Mr. Horace Boddy

J:\Boddy Construction Co\0006 MDOT\Appeal\Correspondence\Clerk of the Supreme Court 2.doc